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89

REPORTS OF CASES

June 14

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO

FROM FEBRUARY 1, 1897, TO AUGUST 30, 1899.

CHARLES H. GILDERSLEEVE,
REPORTER

VOLUME IX.

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JUDGES AND OFFICERS
OF THE
SUPREME AND DISTRICT COURTS
OF THE
TERRITORY OF NEW MEXICO.
FROM 1846 TO 1900, BOTH INCLUSIVE.

COMPILED BY
JOSE D. SENA,
CLERK OF THE SUPREME COURT.

CHIEF JUSTICES.

By the organic act, 1851, the supreme court was constituted of a chief justice and two associate justices. In 1887 a third associate justice was added; and in 1889 was added a fourth associate justice.

APPOINTED.	APPOINTED.
Joab Houghton 1846 by Gen. S. W. Kerney. Died January 31, 1876.	Henry L. Waldo..... 1876 Resigned.
Grafton Backer. 1851	Chas. McCandless 1878 Resigned.
J. J. Davenport..... 1853	L. Bradford Prince..... 1879
Kirby Benedict... . . 1858 Died at Santa Fe, New Mexico, 1875.	Samuel B. Axtell..... 1882 Died at Morristown, New Jersey, 1893.
John P. Slough 1866 Died at Santa Fe, New Mexico, December 17, 1867.	William A. Vincent..... 1885
John S. Watts 1868 Died in Indiana, in 1873.	Elisha V. Long 1885
Joseph G. Palen 1869 Died at Santa Fe, New Mexico, December, 1875.	James O'Brien..... 1889
	Thomas Smith.... . 1893
	William J. Mills. 1898

JUDGES OF THE FIRST DISTRICT.

Headquarters at Santa Fe.

The First District from 1846 to 1860, included the counties of Santa Fe, Santa Ana and San Miguel. In 1860, the counties of Mora, Colfax, Taos, and Rio Arriba, were added. In 1887, the first district was made to include the counties of Santa Fe, San Juan, Rio Arriba and Taos.

APPOINTED.	APPOINTED.
*Joab Houghton 1846 From New Mexico.	*L. Bradford Prince. 1879 from New York.
*Grafton Baker 1851	*Samuel B. Axtell..... 1882 from California.
*J. J. Davenport 1853	**Reuben A. Reeves... . 1887 from Texas.
*Kirby Benedict 1858 from Illinois.	**Wm. H. Whiteman. 1889 from New Mexico.
*John P. Slough 1866 from Colorado.	**Edward P. Seeds. 1890 from Iowa.
*John S. Watts 1868	**Napoleon B. Laughlin . . . 1894 from New Mexico.
*Joseph G. Palen..... 1869 from New York.	*John R. McFie,..... 1898
*Henry L. Waldo 1876 from New Mexico.	
*Chas. McCandless..... 1878 from Pennsylvania.	

*Chief Justice.
**Associate Justices.

JUDGES AND OFFICERS.

ASSOCIATE JUSTICES, SECOND DISTRICT.

Headquarters at Albuquerque.

The Second District, from 1846 to 1860, was composed of the counties of Bernalillo, Valencia, and (soon as organized) Socorro, Dona Ana, and Arizona. In 1860, the District was constituted of the counties of Bernalillo, Valencia, and Socorro. In 1889, Socorro was transferred to the Fifth District.

APPOINTED.		APPOINTED.	
Antonio J. Otero.....	1846	Samuel B. McLin	1877
from New Mexico.		from Florida. Died in Florida.	
John S. Watts.....	1851	Samuel C. Parks.....	1878
from Indiana. Died, 1873.		from Illinois.	
Perry E. Brocchus....	1857	Joseph Bell	1882
from Maryland. Died.		from New York. Died in California, 1887.	
W. F. Boon.....	1859	William H. Brinker	1885
Sydney A. Hubbell	1861	from Missouri.	
from New Mexico. Died at Las Vegas, 1880.		William D. Lee	1889
Perry E. Brocchus.....	1867	from New Mexico.	
from Maryland. Died at Baltimore.		Needham C. Collier ...	1893
Hezekiah S. Johnson ..	1870	from Georgia.	
from New Mexico. Died at Albuquerque, 1873.		Jonathan W. Crumpacker.....	1898
John I. Reddick ..	1876	from Indiana.	
from Nebraska.			

ASSOCIATE JUSTICES, THIRD DISTRICT.

Headquarters at Taos, 1846-1860.

The Third District, from 1846 to 1860, consisted of the counties of Taos and Rio Arriba. In 1860 these counties became part of the First District, organized of Dona Ana county. In 1887, the Third District was reorganized of Dona Ana and Grant counties, with headquarters at Las Cruces. In 1884, Sierra county was added, and in 1899, Otero county was added thereto. In 1895, Silver City was designated as headquarters, and in 1898 Las Cruces was again designated as headquarters.

APPOINTED.		APPOINTED.	
Chas. Beaubien.....	1846	Daniel B. Johnson	1871
from New Mexico. Died at Taos, New Mexico, January, 1846.		from Minnesota.	
Horace Mower....	1851	Warren Bristol.	1872
Kirby Benedict.....	1853	from Minnesota. Died, Deming, New Mexico.	
from Illinois. Died at Santa Fe, New Mexico.		Stephen F. Wilson	1884
Wm. G. Blackwood.	1858	from Pennsylvania	
from South Carolina. Died in New Mexico.		Wm. F. Henderson.	1885
Joseph G. Knapp.....	1861	from Arkansas. Died, Washington, D. C., 1890.	
Joab Houghton	1865	John R. McFie.	1889
from New Mexico. Died January 31, 1876.		from New Mexico.	
Abraham Berger.....	1869	Albert B. Fall....	1893
from Minnesota.		from New Mexico. Resigned.	
Benjamin J. Waters..	1870	Gideon D. Bantz.....	1895
from Missouri.		from New Mexico.	
		Frank W. Parker	1898
		from New Mexico.	

ASSOCIATE JUSTICES, FOURTH DISTRICT.

Headquarters at Las Vegas.

This District was organized in 1887, of the counties of San Miguel, Colfax, Mora, and Lincoln. In 1889, Lincoln county became part of the

JUDGES AND OFFICERS.

V

Fifth District. and, in 1891, Guadalupe county was added, and, in 1893, Union county.

APPOINTED.		APPOINTED.	
Elisha V. Long	1889	Thomas Smith	1893
James O'Brien	1890	from Virginia.	
from Minnesota.		William J. Mills,	1898
		from New Mexico.	

ASSOCIATE JUSTICES, FIFTH DISTRICT.

Headquarters at Socorro.

APPOINTED.		APPOINTED.	
Alfred A. Freeman	1890	Humphrey B. Hamilton	1895
from Washington, D. C.		from New Mexico.	
		Charles A. Leland,	1898
		from Ohio.	

CLERKS OF THE SUPREME COURT.

Appointed by the Court.

APPOINTED.		APPOINTED.	
James M. Giddings	1852	John H. Thompson	1877
of Missouri. Died, Fort Sumner,		of Missouri.	
1890.		Frank W. Clancy	1880
Louis D. Sheets	1854	of New Hampshire.	
of Missouri.		Charles M. Philips.. . . .	1883
Augustine de Marle	1856	of New Jersey.	
Died, Santa Fe, New Mexico.		Euel M. Johnson	1886
Samuel Ellison	1859	of Indiana.	
of Kentucky. Died, Santa Fe,		Robert M. Foree	1887
July 20, 1889.		of Kentucky.	
Wm. M. Gwynne	1866	Summers Burkhart	1889
of Ohio.		of West Virginia.	
Peter Connelly	1867	Harry S. Clancy	1891
of New Mexico.		of New Hampshire.	
Samuel Ellison	1868	Page B. Otero	1893
of Kentucky. Died, Santa Fe,		of New Mexico.	
1889.		George L. Wyllys	1894
William Breeden	1869	of Virginia.	
of Kentucky.		Jose D. Sena	1898
Marshall A. Breeden	1872	of New Mexico.	
of Kentucky.			
Rufus J. Palen	1873		
of New York.			

UNITED STATES ATTORNEYS.

APPOINTED.		APPOINTED.	
Frank P. Blair, Jr.	1846	Thos. B. Catron	1872
from Missouri.		from New Mexico.	
Hugh N. Smith	1847	Sidney M. Barnes	1878
from New Mexico,		from Arkansas.	
Elias P. West	1851	George W. Prichard	1883
Wm. H. H. Davis	1853	from New Mexico.	
from Pennsylvania.		Joseph Bell	1884
Wm. Claude Jones	1855	from New Mexico.	
Richard H. Tompkins	1858	Thomas Smith	1885
from New Mexico.		from Virginia.	
Theodore D. Wheaton	1860	Eugene A. Firke	1889
from New Mexico.		from New Mexico.	
Merrill Ashurst	1861	J. B. H. Hemingway	1893
from Alabama.		from New Mexico.	
Stephen B. Elkins	1867	W. B. Childers	1896
from New Mexico.		from New Mexico.	
S. M. Ashenfelter	1871		
from Pennsylvania.			

JUDGES AND OFFICERS.

ATTORNEY-GENERALS.

Appointed by the Governor, and confirmed by the Legislative Assembly.

APPOINTED.		APPOINTED.	
Hugh N. Smith.....	1846	Stephen B. Elkins..	1866
of Missouri.		of Missouri.	
Elias P. West	1848	Charles P. Cleaver	1867
Henry C. Johnson.....	1852	of Germany. Died, May 30, 1874.	
of Pennsylvania.		Merrill Ashurst .	1867
Merrill Ashurst.....	1852	of Alabama.	
of Alabama. Died, Santa Fe, 1869.		Thomas B. Catron.....	1869
Theodore D. Wheaton.....	1854	of Missouri.	
of Missouri. Died, Ocate, New		Thomas F. Conway.....	1872
Mexico, 1876.		of Missouri. Died, New Mexico, 1900.	
Richard H. Tompkins	1858	Wm. Breeden	1873
of Kentucky. Died.		of Kentucky.	
Hugh N. Smith.....	1859	Henry C. Waldo.....	1878
of Missouri. Died, Santa Fe.		of Missouri.	
Spruce M. Baird ..	1860	Wm. Breeden.	1878
of Texas. Died at Cimarron, New		of Kentucky.	
Mexico, 1878.		Edward L. Bartlett.	1889
Richard H. Tompkins ..	1860	of Kansas. Solicitor General.	
of Kentucky. Died at Santa Fe,		John P. Victory.....	1895
New Mexico, 1888.		of New York. Solicitor General.	
Charles P. Cleaver.	1862	A. B. Fall,	1897
of Germany.		of New Mexico, Solicitor General.	
		Edward L. Bartlett.....	1897
		of New Mexico, Solicitor General.	

UNITED STATES MARSHALS.

APPOINTED.		APPOINTED.	
Richard Dallum.....	1846	John Sherman, Jr.....	1876
John G. Jones	1851	from Ohio. Died, Washington,	
Charles L. Rumley.....	1853	D. C.	
Charles H. Merritt	1854	A. L. Morrison..	1881
Charles Blumner	1856	from Illinois.	
from New Mexico. Died, Santa		Romulo Martinez... ..	1885
Fe, 1872.		from New Mexico.	
Charles P. Cleaver.....	1858	Trinidad Romero.....	1889
from New Mexico. Died, Tome,		from New Mexico.	
New Mexico, 1874.		Edward L. Hall	1893
Abram Cutler	1861	from New Mexico.	
from Kansas.		C. M. Foraker, ...	1898
John Pratt.....	1866	from New Mexico.	
from Kansas.			

LIST OF ATTORNEYS

Practicing in the Supreme Court of New Mexico between 1846 and 1900.

Adams, B. F.
 Allen, Samuel T.†
 Ashurst, Merrill.†
 Ancheta, J. A.†
 Ashenfelter, S. M.
 Alexander, Silas.
 Allen, C. F.†
 Abbott, Edmund C.
 Atkinson, H. M.†
 Axtell, S. B.†
 Bail, John D.
 Baca, Manuel C. de
 Baca Marcos C. de
 Baca, Elfego.
 Barns, R. P.
 Bartlett, Edward L.
 Bateman, U. S.
 Bell, John J.
 Bell, Chas. G.
 Berger, Wm. M.
 Breeden, William
 Breeden, Marshall.†
 Bryan, R. W. D.
 Bonham, J. F.
 Buchanan, Francis
 Buck, Henrietta
 Bunker, William
 Burkhart, Summers
 Burns, William
 Barber, Geo. B.†
 Barnes, Sidney M.†
 Bari, A. J.†
 Bell, Joseph.†
 Bowman, W. C.
 Bristol, Warren.†
 Bryan, D. J.†
 Burns, Harris.
 Bantz, Gideon D.
 Backer, Martin R.
 Burg, E. E.
 Campbell, A. C.
 Catron, Thomas B.
 Caypless, Edgar †
 Crane, William F.†
 Clarke, Fred W.†
 Chacon, Eusebio.
 Chaves, Donaciano.†
 Chaves, E. V.
 Chaves, Francisco J.
 Childers, William B.

Clancy, Frank W.
 Clancy, H. S.
 Clark, Chas. T.
 Collier, N. C.†
 Conway, Thomas F.†
 Coones, W. E.†
 Crist, J. H.
 Crumpacker, J. W.
 Curtin, Thos. E.
 Cameron J. O.
 Cowan, W. H.
 Davis, Wm. W. H.
 Davis, Stephen B. Jr.
 Dobson, E. W.
 Dawson, M. M.
 Downs, Francis.†
 Dougherty, H. M.
 Douglas, Thomas G.†
 Dunne, Edmund F.†
 Eaton, W. J.
 Emmett, LaFayette
 Elliott, A. B.
 Easley, Chas. F.
 Ewing, W. R.
 Fall, A. B.
 Fergusson, H. B.
 Field, Neill B.
 Fielder, James S.
 Fielder, Idue L.†
 Finical, Thos. A.
 Fiske, Eugene A.
 Fitch, J. G.
 Fort, A. C.
 Fountain, A. J.†
 Fox, George W.†
 Frazer, John R.†
 Franks E. B.
 Freeman, A. A.
 Franklin, John
 Frost, Max
 Gary, Joseph E.†
 Gildersleeve, Chas. H.
 Gillett, S. B.
 Garner, J. W.†
 Graves, Jesse C.†
 Green, T. A.†
 Gwin, John M.†
 Goodsir, Jesse C.
 Gortner, R. C.
 Good Arthur C.

Hamilton, H. B.†
 Harlee, A. H.
 Hawkins, W. A.
 Hazledine, Wm. C.
 Heacock, W. C.
 Heflin, Thos. N.
 Hewitt, J. Y.
 Huston, H. E.†
 Hemingway, J. B. H.†
 Hall, J. L.†
 Howard Geo. Hill.
 Howard, Francis H.†
 Holt, H. B.
 Houghton, Joab.†
 Hoyt, Sydney A.†
 Hebbel, Sydney A.†
 Johnston, Geo. W.
 Jones, A. A.
 Jackson, Clifford L.†
 Johnson, R. M.†
 Jaramillo, J. A.
 Jordan, Arthur N.
 Johnson, Henry C.†
 Kelly, W. E.
 Kanebel, John H.
 Kanebel, G. W.
 Kanabel, Earnest.
 Koogler, John H.†
 Leahy, J.
 Lenoir, Lewis W.
 Llewellyn, W. H. II.
 Laughlin, N. B.
 Loomis, H. W.
 Lester, Felix H.
 Larrazolo, O. A.
 Long, E. V.
 Leonard, Frank A.
 Leonard, Ira E.†
 Lemon, George.†
 Loesch, F. J.†
 Lieb, T. D.
 Lund, R. E.
 Lee, William B.
 Martinez, C.
 Martinez, Q. A.
 McDonald, J. M.
 McFie, John R.
 McMillen, A. B.
 McPherson, W. J.
 Medler, E. L.

†Dead. ‡Removed.

Mills, W. J.
 Mills, Melvin W.
 Mitchell, A. J.
 Moice, C.
 Money, Geo. P.
 Montoya, T. C.
 Moore, Horton
 Morrow, John.
 Morrison, A. L.
 Masterson, Murat.†
 Mattison, Frank C.
 McComas, Chas. C.†
 McComas, H. L.†
 Newcomb, S. B.
 Neblitt, Colin.
 Neal, E. E.
 Nesbit, Alexander J.
 O'Bryan, H. J.
 O'Bryan, J. D.
 Ortiz, M. C.
 Ortiz, Hilario L.
 Owen, H. P.
 Parker, F. W.
 Pettijohn, Henrietta.
 Prince, J. Bradford.
 Pino, Pinito.
 Puckett, H. L.
 Pierce, E. W.
 Pierce, W. L.
 Prichard, George W.
 Purday, James H.
 Price, Edward V.
 Pope, William H.
 Preston, George Guyler.
 Pendelton, Grauville.
 Peirce, Edward.
 Pilliams, Palmer J.†
 Posey, G. Gordon.†
 Quinn, James H.†
 Ritch, Wm. G.
 Read, Benj. M.

Read, L. G.†
 Read, Alexander.
 Renehan, A. B.
 Rodey, S. B.
 Richardson, G. A.
 Rood, John C.†
 Rogers, Albert T. Jr.
 Reading, A. B.
 Reynolds, James R.
 Riley, Chilion
 Risque, John B.†
 Russell, D. C.†
 Rynerson, Wm. L.
 Sulzbacher, Lewis.
 Spiess, Chas. A.
 Springer, Frank
 Sniffen, John S.
 Snyder, Karl A.
 Salazar, Miguel.†
 Sutherlin, J. H.†
 Smith, Derwint H.†
 Smith, Thomas.†
 Solignac, Gus.
 Smith, Olin E.
 Seaberg, Hugo.
 Stingle, John H.
 Smith, B. J.
 Sterry, C. A.
 Sidebottom, Earl E.
 Strong, Heber.
 Smith, C. E.
 Smith, G. Pitman.†
 Sena, Jose D.†
 Shaw, James M.†
 Shield, David P.†
 Skinner, Wm. C.†
 Sloan, Andrew†
 Sloan, Wm. B.†
 Stearns, DeWitt C.†
 Stone, W. S.
 Stevens, Benjamin

Thornton, Wm. T.
 Twitchell, R. E.
 Trimble, L. S.
 Todd, David R.†
 Tiffany, I. S.†
 Terrill, Wm. C.†
 Thompson, F. A.†
 Tompkins, Richard H.†
 Tuley, Murry F.
 Vander Ver, P. L.†
 Victory, John P.
 Veeder, John D. W.
 Veeder, Elmer.
 Vincent, Wm. A.†
 Waldo, Henry L.
 Warren, Henry L.
 Williams, W. S.†
 Wiley, Moses.
 Wilkerson, Thos. N.
 Winger, D. H.†
 Whiteman, Wm. H.
 Wicks, Moyer.†
 Williamson, James A.†
 Woodward, Jesse B.†
 Wade, E. C.
 Williams, O. S.
 Wharton, J. E.
 Wycoff, A. H.
 Winter, W. H.
 Whitehead, E. S.
 Waitman, Hanson†
 Warner, Milton J.†
 Watson, W. B.†
 Watts, John.†
 West, Elias B.†
 Wheatin, Theodore.†
 Wright, F. J.
 Yeaman, Caldwell.†
 Young, J. Morris
 Young, R. L.

†Dead. ‡Removed.

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DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF NEW MEXICO.

[No. —. February 1, 1897.]

WESTERN HOMESTEAD & IRRIGATION COMPANY,
Plaintiff in Error, v. **FIRST NATIONAL BANK OF**
ALBUQUERQUE, Defendant in Error.

GARNISHMENT—ORIGINAL JUDGMENT—ASSIGNMENT OF ERRORS—NOT TENABLE, WHEN.—On writ of error in a garnishment proceeding, where the original judgment remains unappealed from for more than one year from the date of its original entry, errors assigned in respect to such judgment are not tenable, and the judgment remaining undisposed for that time can not now be collaterally attacked.

ID.—SUMMONS—SERVICE—SUFFICIENCY.—In such proceeding, failure to serve the garnishee with a summons in the form prescribed by the clerks of the district courts, is not ground for reversal; it is sufficient if the service be in substantial compliance with the requirements of the statute. *Fitzgerald v. Fitzgerald*, 137 U. S. 98.

ID.—CORPORATIONS—CONTRACT BY AGENT.—Where the by-laws of a corporation required its contracts to be signed by two at least of its officers, and its general manager made a verbal contract with a third party in good faith, which was afterward reduced to writing, and signed by him as such manager in the presence of all its officers, without objection,—Held: That the corporation was bound by the contract.

ID.—CORPORATIONS—CONTRACTS NOT UNDER SEAL—SUFFICIENCY.—In such case, it is not necessary to bind a corporation, that its contracts be under seal.

Error, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

F. W. CLANON for plaintiff in error.

A. B. McMILLEN for defendant in error.

LAUGHLIN, J.—This cause came here on error to district court sitting in and for the county of Bernalillo, in the Second judicial district. The defendant in error, the First National Bank of Albuquerque, recovered judgment on March 5, 1895, against Jesse Anthony and George E. Lewis on their promissory note for \$240.10 and costs. Thereafter the defendant in error sued out garnishment proceedings against the plaintiff in error, the Western Homestead & Irrigation Company, alleging it, said plaintiff in error and garnishee, was indebted to said Anthony, said judgment debtor. Thereafter, on the twenty-third day of May, 1896, the court directed a verdict in favor of the defendant in error and against the garnishee and plaintiff in error for \$288.54 and costs, and judgment was entered accordingly; whereupon the garnishee moved for a new trial, and in arrest, both of which motions were denied; and on the sixth day of June, 1896, error was sued out to this court. The errors assigned by the plaintiff in error are: 1. "The court below erred in entering judgment nil dicit against the original defendant, while there was in the record, undisposed of, a plea on which issue had been joined." 2. "The court below erred in trying the original cause without a jury." 3. "The court below erred in entering judgment for the amount appearing to be due on the promissory note sued on, for the reason that the same was not denied under oath." These errors apply to the original suit of the First National Bank against Anthony and Lewis.

GARNISHMENT:
original judgment:
assignment of errors:
not tenable,
when.

The judgment in that case was entered in the court below on the fifth day of March, 1895, and it does not appear from the record that any motion for new trial was filed, or any effort made to review the judgment then entered in the court, until the twenty-third day of May, 1896, and not until judgment had been entered against the garnishee, plaintiff in error. Thus the original judgment remained unappealed from for more than a year from the time of its original entry. "Appeals in equity cases and writs of error in common law cases may be taken at any time within one year from the date of the rendition of final decrees or judgments." Laws 1891, chap. 66. It is manifest that the writ of error from the judgment in the original case against Anthony and Lewis was not seasonably sued out, and the errors assigned with respect to that part of the case are untenable. And, the judgment having remained undisturbed for more than the period provided by statute in which the writ of error must be availed of, it can not now be attacked in the collateral manner here sought. *Freem., Judgm.* [3 Ed.], sec. 249. Under the authority of *Knaebel v. Slaughter* (N. M.), 34 Pac. 199, the first assignment here would have been available if the writ of error had been sued out at any time within one year from the time of the rendition of the final judgment; but it was not, and therefore this objection can not be maintained. While the garnishment proceeding is ancillary to the original suit, and is a remedy in aid of the execution issued on the judgment in that suit, yet it is a separate and distinct action in rem, and can not be considered as a part of the original action. It raises separate and distinct issues from the main action, and involves different parties, and is appealable in the same manner as other causes of action of a like nature; and both the original action and the garnishment proceedings might have been brought to this court on separate writs of error. 8 Am. and Eng. Ency. of Law 1257. And it was held in *Pupke v. Meador*, 72 Ga. 230, that the two cases could not be

consolidated, but must be brought to the appellate court on separate and distinct writs of error. And the reversal of the judgment in the main case also reverses the judgment in garnishment case, but a reversal of the garnishment judgment does not reverse the main case.

The next objection is as follows: 4. "The court erred in denying garnishee's motion to quash the notice of garnishment." Counsel for plaintiff in error appeared specially, and moved to quash the notice, "for the reason that the same is not in terms made returnable in the same way as original process for bringing defendants into court." This motion was based on the eighth subdivision of rule 27 of the rules of the district courts, which is as follows: "(8) A like practice shall prevail in garnishee proceedings upon executions, with such omissions, additions and changes as may be applicable thereto; but the notice of the garnishee shall be in terms returnable in the same way as original process for bringing defendant into court." The record shows that the execution was issued on the fourteenth day of March, 1895, and the notice of garnishment was attached to it, and that both were served on the garnishee on the thirteenth day of May, 1895,

SUMMONS:
service:
sufficiency.

at the county of Bernalillo, and that the notice cited the garnishee therein named to appear on the first Monday of June following. The notice of garnishee was in the form prescribed by the statute and by the rules of the district courts. The statute provides as follows (Comp. Laws 1884, sec. 1935, subd. 2): "Garnishees shall be summoned by the sheriff declaring to them that he summoned them to appear at the return term of the writ to answer the interrogations which may be exhibited by the plaintiff, and by reading to them if required." The writ referred to in the statute means the execution. And it is provided further in section 2159: "That if the officer fails to find property sufficient to make the same he shall notify all persons who may be indebted to said defendant not to pay said defendant, but to appear before the court out of

which said execution issued and make true answer on oath concerning his indebtedness, and the like proceedings shall be had as in cases of garnishees summoned in suits originating by attachment." It is plain then, that the process to bring garnishee before the court was in substantial compliance with the statute. The rule of district courts invoked is not in contravention of the requirements of the statute. The garnishee was notified in the manner required by the statute to appear at the first return day occurring twenty days after service, and appeared specially in the motion to quash the notice, which motion was denied by the court. Then a general appearance was entered, and the case proceeded in the regular manner provided in such cases. Judgment rendered, and brought here on writ of error. And this court could not be justified in reversing the case simply because the garnishee had not been served with a summons in the form prescribed by the clerks of the several district courts, when the procedure pursued was in substantial conformity with the requirements of the statute. *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98.

There are a number of other errors assigned for reversal, one of which is as follows: (7) "The court below erred in overruling garnishee's objection to the admission of oral evidence as to whether E. W. Thomas had general supervision of the business of the garnishee, and in holding that, if Thomas was accustomed to act in a certain way as to these matters and the business went on and he was held out by the corporation to transact such matters and they ratified such authority by acquiescence, their silence would bind the corporation." It appears that to establish the indebtedness of the garnishee to the judgment debtor, Anthony, the defendant in error offered in evidence a certain contract, signed by said Anthony as party of the first part, and the garnishee corporation, by one E. W. Thomas, as general manager, as party of the second part, and under the terms of this contract it is contended by defendant in error that plaintiff in error is indebted to said Anthony, and therefore

CORPORATION:
contract by
agent.

liable as garnishee. The contract discloses that on January 3, 1895, the said Anthony was then the owner of certain interests consisting of capital stock and assets in the Rio Puerco Irrigation & Improvement Company, and in the Rio Puerco Irrigation & Agricultural Company, both of which were domestic corporations; that said Anthony then sold all his interests in both said corporations to the Western Homestead & Irrigation Company, the garnishee, for which the garnishee agreed to pay certain sums of money and securities therefor, as in the contract specified; and the said Anthony further agreed as an additional consideration to give his services and labors to the said garnishee company for a period of ten months from and after the first day of November, 1894. On the day the contract was signed, Anthony assigned his said interests to the garnishee company, and deposited it with the garnishee's attorney at Albuquerque. The garnishee company contends that said Thomas had no authority, under its by-laws, to enter into said contract, and that, therefore, it is not bound by it. In support of this contention garnishee offered in evidence its by-laws, of which the two sections material to this case are as follows, to wit:

"The general manager shall have general charge of the office of the company, and have general supervision of the books and accounts. He shall give general directions as to the work to be done, provide ways and means for doing such work, suggest the form of papers, contracts and obligations, and in general direct its movements and affairs. He shall have power to draw on the treasurer to carry out the interest of the company, and to make contracts as his judgment may direct. He shall be authorized to receive and receipt in the absence of the secretary any funds which may come into his hands, and account for the same to the secretary, and sign such papers and perform such other duties as the board of directors may prescribe."

"Contracts and Conveyances. All notes, deeds, contracts, and other evidences of debt or obligations, to bind the com-

pany, must be signed by two at least of the following officers: President, general manager, secretary, or treasurer, but no money shall be borrowed or note given except the same is authorized by the board of directors."

Upon the validity of this contract the liability of the garnishee is fastened, if at all. It will be observed from the by-laws that the duties of the general manager are of a very broad and general nature, and pertain to the general management of the business affairs of the garnishee company. It is also apparent therefrom that "all notes, deeds, contracts, and other evidences of debt or obligations, to bind the company, must be signed by two, at least, of the following officers: President, general manager, secretary, or treasurer, but no money shall be borrowed or note given except the same is authorized by the board of directors." It appears from the testimony that at the time the contract was entered into verbally between Anthony and the garnishee company, in October or November, 1894, McChesney, president, Tygert, Thomas, and McMasters, were all directors and officers of the garnishee company, and were present, and made, agreed to, and entered into the verbal contract with said Anthony, which was thereafter reduced to writing, and signed by said Anthony, and by said Thomas as general manager, and that all the directors and officers of the garnishee company consented to and had full knowledge of the contents and existence of the contract at all times, and acquiesced in the same, and never at any time repudiated or in any manner changed the contract in any particular. It further appears that said Anthony, in pursuance of the fulfillment of his part of the said contract, entered upon the duties assigned him by garnishee company, and worked for four months, during which time he received and executed all orders in and about the work assigned to him; that after the expiration of that time, and during the remainder of the ten months for which he had agreed to work for garnishee company, he at all times remained present at the place, ready, able, and willing to perform any labor or duties

which it might assign to him; but that he received no orders or instructions to do any work or to perform any duties, but he was not discharged or released from the employment of the said garnishee company. There is nothing to show, nor is it contended, that the garnishee company ever at any time delivered up the assignments of the interests executed by said Anthony to it, or that any reassignment of the same was ever made, but, to the contrary, in so far as this record discloses, the interests and property assigned by said Anthony are now the property of and in the possession of the garnishee company, which the evidence tends to show amount to several thousand dollars. The facts, as shown from the record, are amply sufficient to sustain the verdict and judgment of the court below.

It would be contrary to sound principles of law, and a travesty on justice, to hold that an officer of a corporation may enter into a contract in good faith with an individual for the transfer to it of valuable property, hold and keep it, and then decline to pay for it, because, forsooth, the officer so entering into the agreement did not have special authority to make and sign the contract conferred on him by the provisions of its secret by-laws. But the case at bar is much stronger, because all the officers of garnishee company were present when the terms of the contract were agreed upon verbally, which was afterwards written out by the general manager, and signed by him on behalf of garnishee company; and none of them appeared to have at any time attempted to repudiate any part of it until on the trial of this cause. Morawetz on Private Corporations (section 593), says: "It is plain that a person who has dealt with an agent of a corporation in good faith, within the scope of the apparent powers conferred upon him by the company, is not affected by secret instructions limiting these apparent powers. The same is usually true of restrictions on the apparent powers of the agents of a corporation by the company's by-laws. There is no general rule compelling persons dealing with a corporation, at their peril, to take notice

of its by-laws. If a corporation appoints an agent of a class having certain functions and powers according to general custom, a person dealing with such agent is not affected by a by-law restricting the powers which would ordinarily belong to an agent of that class, in the absence of actual notice of the by-laws." Mr. Story, in his work on Agency (section 17), says: "A general agency properly exists where there is a delegation to do all acts connected with a particular trade, business, or employment." And the same author, in section 126, says: "In the former case [referring to a general agent] the principal will be bound by the acts of the agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances." And in section 127 he says: "The ground of this distinction is the public policy of preventing frauds upon innocent persons in the encouragement of confidence in dealing with agents. If a person is held out to third persons, or to the public at large, by the principal, as having general authority to act for and to bind him in a particular business or employment, it would be the height of injustice, and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting his authority and thus to defeat his acts and transactions under the agency, when the party dealing with him had, and could have, no notice of such instructions. In such cases good faith requires that the principal should be held bound by the acts of the agent within the scope of his general authority." When this corporation appointed Thomas as its general manager, and held him out to the public as such, it became bound to all third persons dealing with him on the strength of such apparent power, and within the scope of his duties, for all acts within the legitimate powers of the corporation; and, if Thomas violated any of the secret instructions and by-laws, the principal should suffer, and not an innocent third party, who acted upon

the representations of the principal as to the extent of the agent's authority.

It was not necessary to the validity of the contract in question that it should have been made under the corporate seal of garnishee company. Mor. Corp., sec. 338, says: "In former times it was held that a corporation could not express its

CORPORATIONS:
contracts not
under seal;
sufficiency.

will, or enter into a contract, except through an instrument under seal, executed by a duly constituted agent. This doctrine certainly had no principle based upon reason to support it. On

the contrary, it seems to have been the result of the ignorance of the art of writing during the Dark Ages. It was never rigorously applied in all cases, which shows that it did not result from the nature of the corporation. And in modern times the ancient rule has been wholly discarded. It is now a settled rule through the United States that a corporation may make a contract without the use of a seal in all cases in which this may be done by an individual, and it is equally well settled that an agent of a corporation may be appointed without the use of a seal, whatever may be the purpose of the agency." In the case of *Kelsey v. Bank*, 69 Pa. St. 426, on the question of ratification, Williams, J., said: "The law is well settled that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own; and the maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of ratification of any other principal, and is equally to be presumed from the absence of dissent." And in the case of the *Indianapolis Rolling-Mill Co. v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 250, the supreme court of the United States hold that a disaffirmance of the unauthorized acts of the agent of a corporation within six months after knowledge by the directors is not exercised promptly, and comes too late. And in the case of *Pittsburg, C. & St. L. R'y Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, the same court says: "The principal

positions taken in the arguments for the appellants were that the Indiana Central Company and the Pennsylvania Company never authorized their officers to execute the bridge contract, or to bind them by it; and that the contract was beyond the scope of their corporate power. But the court is of the opinion that on the facts of this case neither of these positions can be maintained. When the president of a corporation executes in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act. *Indianapolis Rolling-Mill Co. v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256; 7 Sup. Ct. 542. And when a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation received the benefit of the contract, without objection, it may be presumed to have authorized or ratified the contract of its agent," citing many cases. And to the same effect is *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98.

A number of other errors are assigned, but it is not thought necessary to pass upon each of them, for the reason that those here considered include the others. Counsel for plaintiff in error has cited a great many authorities worthy of consideration from his point of view, but, in our opinion, they are inapplicable to the facts as disclosed at the trial and in the record. There appearing to be no substantial errors of record, the judgment of the court below is affirmed, with costs against garnishee company.

Smith, C. J., and Bantz, J., concur.

[No. 643. March 1, 1897.]

RIO GRANDE IRRIGATION & COLONIZATION
COMPANY, Plaintiff in Error, v. CHARLES H.
GILDERSLEEVE, Defendant in Error.

JUDGMENT BY DEFAULT—RECITAL.—In a judgment by default, it is not necessary to recite that defendant has been called.

ID.—CORPORATIONS—WITHDRAWAL OF APPEARANCE—RATIFICATION.—Defendant could not complain of the absence of an order granting leave to withdraw its appearance, by attorney, where the court in granting a judgment by default ratified the act of withdrawal.

ID.—MOTION TO VACATE—SUFFICIENCY.—It was not error to overrule a second motion to vacate a judgment by default, where no motion to vacate the judgment was filed until two months after its entry, and no affidavit of merits for a year, and not until after the first motion had been overruled.

Error, from a judgment for plaintiff by default, to the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

F. W. CLANCY for plaintiff in error.

The appearance of a defendant, once regularly entered, can not be withdrawn without leave of court. U. S. v. Curry, 6 How. 111; see, also, Michew v. McCoy, 3 W. & Sarg. 501; Dana v. Adams, 13 Ill. 692, 693; Creighton v. Kerr, 20 Wall. 13.

The record does not show that the defendant below ever attempted to withdraw its appearance. 20 Am. and Eng. Ency. Law, 475, and cases cited; Fisher v. Cockerell, 5 Pet. 254; Sargeant v. State Bank, 12 How. 384, 385; Bronson v. Schulten, 104 U. S. 412, 413; England v. Gebhardt, 112 Id. 505; Vanderkarr v. State, 51 Ind. 95; Kirby v. Wood, 16 Me. 82,

83; *Storer v. White*, 7 Mass. 448; *Pierce v. Adams*, 8 Mass. 383; *Sharp v. Danguy*, 33 Cal. 12, 13; *Nichols v. Bridgeport*, 27 Conn. 465, 466; *Newman v. State*, 14 Wis. 430, 431. See, also, *Bowen v. State*, 9 N. E. Rep. 379; *Applegate v. White*, 79 Ind. 413; *Indianapolis v. Kollman*, Id. 508, 509.

No presumption can be invoked to aid the record in this case. *Hudson v. Breeding*, 7 Ark. 445; *Cole v. Allen*, 51 Ind. 122; *Galpin v. Page*, 18 Wall. 366, 367.

The record does not show the entry of any default. *Davidson v. Murphy*, 13 Conn. 217, 219; *Wales v. Smith*, Id. 217, note; *O'Connell v. Hotchkiss*, 44 Id. 53, 54; 10 Went. Pl. 429-439.

WARREN, FERGUSON & GILLET for defendant in error.

BANTZ, J.—The defendant below was only served with process, and on the third day of August, 1894, entered its appearance by attorney. On the fifteenth of September the attorney, in writing, withdrew appearance of the defendant, and on the same day judgment was taken for failure to appear. On October 5th execution was issued, and on October 26th return was made of nulla bona. On November 15th defendant filed its motion to vacate the judgment. This motion was not argued and submitted until September 6th of the following year (1895), when it was overruled. Three days afterwards another motion to vacate was filed with an affidavit of merit. This motion was likewise overruled, and the cause is brought here on writ of error.

Section 4, chapter 66, Acts 1891, entitles the plaintiff to a judgment if the defendant fails to appear, and it may be rendered at any place in the district. There was no occasion for the judgment to recite that the defendant had been called. The absence of an order granting leave to withdraw the appearance of the defendant was not a matter of which defendant could complain. The court, in granting the judgment, ratified the act of withdrawal. It is not pretended that any

JUDGMENT by
default: recital.

CORPORATIONS:
withdrawal of
appearance:
ratification.

collusion was practiced between the plaintiff and the defendant's attorney, nor that the attorney, either in entering or withdrawing defendant's appearance, acted without authority or by mistake. It is urged that the withdrawal

has not been preserved properly in the record brought to this court, and our attention is called to its recital in the record proper, where it is claimed to have been improperly copied by the clerk in preparing the transcript. But the written withdrawal was also preserved by the bill of exceptions.

The affidavit of merit does not charge that the resolutions of the board of directors of defendant company authorizing and afterwards recognizing the creation of the debt were fraudulently or collusively procured, but it is charged that the corporation received no benefit from the note, which was really for the benefit of the indorser now suing upon it. An

MOTION to vacate:
sufficiency.

affidavit of merit would not alone be sufficient to entitle a defaulting party to have a judgment against it set aside, and much less entitle it to a reversal of the district court for refusing to set the judgment aside. Trial courts have a liberal discretion over such matters, which an appellate court has not. This judgment was rendered September 15, 1894; yet the affidavit of merit was not filed till September 9, 1895, after a motion to vacate the judgment had been overruled. The affidavit of merit filed in support of the second motion to vacate sets out that affiant had been employed as attorney by certain of the stockholders of defendant company in another suit, and communicated to them the fact of this judgment, "some weeks after the judgment had been obtained," "in the month of October, 1894," and that he was employed as attorney for the company on the seventh of November, 1894. Rule 29 provides that no motion to set aside judgments rendered in vacation shall be entertained unless filed, and a copy thereof served on the opposite party, within ten days after the entry of such judgment. It will not be necessary to determine whether the court below could have

set aside the judgment on an application filed after the ten days had expired if a diligent effort and a showing of merit had been made, but there was such an apparent lack of diligence in this case that we think the trial court properly refused to set the judgment aside. There is no error in the record, and the judgment must be affirmed.

Smith, C. J., and Laughlin, J., concur.

[No. —. March 1, 1897.]

UNITED STATES OF AMERICA, Appellee, v. SAMUEL
L. BACHELDOR, Appellant.

PUBLIC LANDS—CUTTING TIMBER FOR RAILROAD—STATUTORY CONSTRUCTION.—The term “adjacent,” within the meaning of the act of congress allowing the Denver and Rio Grande Railroad to take timber for construction from public lands adjacent to the right of way, does not apply to lands lying beyond the tier of townships adjoining those through which the right of way of the road extends.

Appeal from a judgment of the First Judicial District Court, convicting defendant of unlawfully cutting timber on public lands. Affirmed; Hamilton, J., dissenting.

The facts are stated in the opinion of the court.

CHARLES A. SPEISS for appellant.

A. A. JONES for appellee.

BANTZ, J.—The defendant, Bacheldor, was indicted, tried and convicted in the First judicial district court, under section 2461, Rev. Stat. U. S., for unlawfully cutting timber upon public lands. The defendant admitted the cutting, but justified it under an act of congress granting to the Denver & Rio Grande Railroad Company a right of way, and the right

to take from the public lands adjacent thereto stones, earth, water, and other materials required for the construction, etc., of the railway. The question arises as to the meaning of the word "adjacent" in this act. The timber was cut some twenty or twenty-four miles in a direct line from the right of way. The distance by wagon road was much further. The court below charged the jury that the word "adjacent," as used and applied in the act of congress, meant and extended to the tier of townships lying adjoining on either side of the townships upon, through, and over which the line and right of way of the railroad runs.

The question as to the intent of congress employing the word "adjacent" in the act has been before the courts a number of times, but there has been a marked disinclination to define its meaning with exactness, and there has been quite a difference of opinion expressed. See *U. S. v. Denver & R. G. R. Co.*, 31 Fed. Rep. 889, per Judge Hallett; same case, as appealed, 34 Fed. Rep. 841, per Justice Brewer; *U. S. v. Chaplin*, 31 Fed. Rep. 890, per Judge Deady; *U. S. v. Lynde*, 47 Fed. Rep. 297, per Judge Knowles; *U. S. v. Railroad Co.*, 29 Alb. Law Journal 24; 1 Am. and Eng. Ency. Law [2 Ed.] 634; Secretary Teller to the Commissioner of General Land Office, 1 Land Dec. Dep. Int. 610; *Stone v. U. S.*, 64 Fed. Rep. 673; Secretary Vilas to the Attorney General, 8 Land Dec. Dep. Int. 41; *U. S. v. Denver & R. G. R. Co.*, 150 U. S. 1. It is manifest that what would be adjacent under some circumstances would not be under others. The condition of the country through which the right of way extends should be considered. But still the mere poverty in building materials of the county in the immediate neighborhood of the right of way would not be sufficient to extend the meaning of "adjacent" to reach remote lands from which such materials may be supplied. The lands from which such materials are taken must at least lie near, the term "adjacent" being in this connection relative. The condition of the country can not make lands adjacent which are not; but the statute should receive such a liberal construction as will carry out

the objects intended. Perhaps the safer course in ascertaining the meaning of such terms is in the process of exclusion and inclusion, a method which has accomplished so much for our common law. It is safer to say what in a given case is excluded from the meaning of adjacent than to say what under all circumstances it includes. We need not determine whether in all cases timber may be taken from the public lands under such license, so far as the outer lines of the townships adjoining those through which the road runs; but it must be recognized that lands are not adjacent which lie beyond the tier of townships adjoining those through which the right of way runs, as in the case at bar. The township is the largest subdivision of land designated in the government survey; and, in laying down this limit, we can not say that the court below committed error. The judgment will therefore be affirmed.

Smith, C. J., and Collier, J., concur.

HAMILTON, J. (dissenting).—I can not concur in the conclusion reached by a majority of the court in this case, in affirming the judgment, in sustaining an instruction wherein the court below sought to determine, as a matter of law, what lands shall be included in the term “adjacent.” The act of congress granted the right of way through the public lands to the Denver & Rio Grande Railroad Company, its successors and assigns, granting the right of way over the public domain, 100 feet in width on each side of the track, and also granted the right to take, from the public lands adjacent thereto, stone, timber, earth, and other material required for the construction and repair of the railway and telegraph lines. The court below, in charging the jury as to the law, declared that the term “adjacent,” as used and applied in the act of congress, means the tier of townships lying adjacent on either side of the township upon, through, or over which the line or right of way of the Denver & Rio Grande Railroad runs, and held as a matter of law, that, unless the timber so taken was taken

within that boundary, that is, within the boundary around the township adjoining the township through which the road ran, that the defendant could not justify himself on the ground of a license.

The determination of the cause turns upon the construction to be given to the word "adjacent" as used in the charter of the company. What could have been the intent and meaning of congress in the employment of the word "adjacent" as to the use of building material for the construction of the road along its line? Congress has not attempted to give construction to this term, as it has been used in this or other similar charters; nor has it attempted to define the boundary line between the land which should be included and that which should be excluded within the term "adjacent to the line of the road." It is therefore left to the courts to look to this class of legislation, and consider the condition of the country at the time of its adoption, the object sought to be accomplished, and the means intended to be employed to the attainment of the end sought, and from these, if we can, give this term that just and fair construction which will carry out the intent and purpose of the government in the adoption of this class of legislation. The government, as the original owner of this vast domain of country between the Missouri and the Pacific coast, sought to adopt measures which would lead to the opening, settlement, and development of this vast unoccupied area; and, as a means to the attainment of this end, it adopted the policy of extending its aid to the construction of internal improvements, and granted title to its lands, and ceded to the promoters of these vast enterprises lands, timber, and other material to aid in the construction of these railroads. Some of these roads were to be built hundreds of miles across barren wastes and mountainous countries, where little or no timber or material could be obtained immediately adjoining the roads to aid in their construction. The government said to the promoters of these enterprises: "We will give you a grant of the right of way over our domain and lands, to aid you in these enterprises, and, in addition, we will

allow you to enter upon and take from our land adjacent to your road timber and other material to aid in its construction." The Denver & Rio Grande Railroad Company, the appellee herein, was one of the beneficiaries of this governmental policy, and was granted in its charter the privilege of taking from the public lands lying adjacent to the line of its road timber, stone, and other materials to aid in the construction and completion of its road.

Looking, therefore, to the country at the time of the adoption of this legislation, and the purposes intended to be accomplished by the act, it is clear, we think, that a liberal construction should be given to this clause of the act, in favor of the grantees and as against the government. This, as we understand, has been the construction placed upon this class of legislation by the courts of the country. In the case of *U. S. v. Denver & R. G. R. Co.*, 150 U. S. 14, Justice Jackson, in rendering the opinion of the court, uses this language: "Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law, and manifesting clearly the intention of congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted." It is also stated by the court in the same opinion that, while public grants are construed strictly as against the grantees, yet they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In the case of *Winona & St. Peters Railway Co. v. Barney*, 113 U. S., Justice Field, speaking for the

court, says: "The act making the grants * * * are to receive such a construction as will carry out the intent of congress, however difficult it might be to give full effect to the language used if the grants were by instrument or of private conveyance. To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together." And also in the case of *U. S. v. Denver & R. G. R. Co.*, 31 Fed. Rep. 889, Judge Hallett says: "It seems unreasonable to say that in this connection the word refers to the government subdivision lying next to the right of way; and, if we should so declare, it would be difficult to point out what subdivisions are meant. Accepting the larger meaning of the word, the right to take timber from the public lands under these acts extends naturally some distance from the right of way, and probably within ordinary transportation by wagon." And also in the case of *U. S. v. Lynde*, 47 Fed. 297, Judge Knowles observes. "Considering these cases, it is evident that the adjacent land named in the charter of the Northern Pacific Railroad Company was not intended to be land contiguous to or adjoining the line of its railroad. * * * We are led to the conclusion that it must be determined by the evidence in the case." In the case of *U. S. v. Northern Pac. R. Co.*, 29 Alb. Law J., 1 Am. and Eng. Ency. Law, the court uses this language: "Was the land in question in the neighborhood of defendant's line of road, within the meaning of section 2? The design of this question was to allow the company to take timber from public lands to build its road, and when we once concede that under this section the defendant is authorized to go beyond adjoining lands, as the use of the word 'adjacent' compels us to do, it must follow that the use of the more enlarged word was for the benefit of the Northern Pacific Railroad Company, and it must be so construed by the court as to effect the object of its enactment. And we are of opinion that timber land nearest to the line of the road must be held to be neighboring timber land, even although there may intervene large tracts of land not timbered. If this be

so, then, under the facts of these cases, as above stated, the lands from which the timber in question was cut were in the neighborhood of the line of the road where it was used, and therefore 'adjacent' thereto, within the meaning of section 2 of the charter of the defendant Northern Pacific Railroad Company. Besides, under the facts proven in these cases, the lands in question would probably come within a more restricted use of the word 'adjacent,' for the line of defendant's road runs for several hundred miles through a country almost entirely destitute of timber, and the belt upon which this timber in question was cut was the first timber land near said road reached by it in the course of its construction. Therefore, though this timber be more than one hundred miles from the line of defendant's road, we are of the opinion that it must, under the circumstances, be held to be 'adjacent' thereto."

From these authorities it is clear that a liberal construction should be given to the word "adjacent" in favor of the grantee to aid in the construction of its road. As to whether any particular land or the land in controversy in this case is adjacent to the line, so as to authorize the company to take the timber therefrom to aid in the construction of its road, is not a question entirely of law, to be arbitrarily determined by the court, but is a question of mixed law and fact, which should be determined by the jury under proper instructions given by the court. As is correctly stated, each case must stand upon its own facts. What may be adjacent in one case might not be so regarded in another. The barrenness of the land through which the road runs, and its poverty of building materials, is a controlling reason, which must enter into the determination as to whether the land is or is not adjacent. If timber could be obtained from land a mile from the track, in abundant quantities to meet the demands of the road, the company would not be permitted to go ten miles from the road, and cut timber which could be obtained within one mile for the use for which it was intended. On the other hand, if the land lying within the first ten or twelve mile along and immediately adjoining the road is entirely barren of timber, and

destitute of material which could be used in its construction, but immediately outside of these limits, say, within thirteen miles, an abundance of timber and material can be obtained, then the court has no right to say, as a matter of law, that this timber and material are not adjacent. The position assumed by the court in this case is that the court shall say whether the land is or is not adjacent, and shall fix judicially a line across which the company will not be permitted to go in the selection of material to aid in the construction of its road. In other words, if the position assumed by a majority of the court is true, then it might occur that this railroad is constructed through a section of country where, for hundreds of miles along its track, there would not be a stick of available timber on the section adjacent to the section through which the road is built which could be used in its construction; and yet just over this line, within a few hundred feet of it, there might be a vast unbroken forest stretching for miles along the track from which timber could be had, but which could not be touched by the company, because it is ten feet over the line arbitrarily fixed by the court. Can it be contended that the railroad company is to be confined to that particular limit, within twelve miles, at the very furthest from its line? That there might also exist immediately outside of this boundary a vast domain covered with timber, yet the company would not be permitted to take from it one stick to use in the building of its line? Such a view is against the spirit and meaning of the law, and could not have been the intent of the government in granting this charter. Was it the intention of congress, in the adoption of this legislation, to extend a liberal policy in the encouragement of these internal improvements? If so, its language should not be given that narrow and restricted meaning which will defeat the end sought to be accomplished by the act. In my judgment, the conclusion reached by the court in this case can but lead to the latter result. I am therefore of the opinion that the construction given by the court to the term "adjacent," fixing thereby the limit beyond which the company could not take the timber at a

distance of six miles outside of the township through which the road runs, is a construction too narrow and restricted, and confines the company to a limit not justified either by the letter or spirit of the act. I therefore feel it my duty to dissent from the opinion reached by a majority of the court in this case.

[No. 654. July Term, 1897.]

G. WORMSER & COMPANY, Plaintiffs in Error, v.
SIGMUND LINDAUER, Defendant in Error.

PARTNERSHIP—CONTRACT—CONSTRUCTION.—Where, on an agreement between partners, that the partnership should “stand dissolved from and after” a named date, the retiring partner to retain an interest in the accruing profits of the new firm until a certain date, when an appraisement of the firm assets would be made and a final accounting had, an action of assumpsit was brought by the new firm as such on an account against the retired partner for an alleged indebtedness previously accruing,—Held: That the action could not be maintained.

Error, from a judgment for defendant, to the Third Judicial District Court, Grant County. Affirmed.

The facts are stated in the opinion of the court.

S. M. ASHENFELTER for plaintiffs in error.

When settlement has been made and balance struck, an action at law will lie for recovery of balance. *DeJarnett's Ex'r v. McQueen*, 31 Ala. 230, 68 Am. Dec. 164; *Edgar v. Baca*, 1 N. M. 613.

An action at law can be maintained where there has been a final settlement of the affairs of the concern including the collection of its assets, the discharge of its liabilities, and the statement of balances. *Russell v. Byron*, 2 Cal. 86; *Ross v.*

Cornell, 45 Id. 133; Fisher v. Sweet, 67 Id. 228; Beaton v. Wade, 14 Colo. 4; also notes to 17 Am. and Eng. Ency. Law, 1254; Gulick v. Gulick, 14 N. J. Law, 578; Clark v. Dibble, 16 Wend. 601; note 6, 17 Am. and Eng. Ency. Law, 1267.

No express promise to pay such balance is necessary. Mackey v. Auer, 8 Hun. 180, and citations in note 1, 17 Am. and Eng. Ency. Law, 1268. See, also, 1 Chit. [6 Ed.] 39, note 2; Wray v. Milestone, 5 M. & W. 21; Williams v. Henshaw, 11 Pick. 82; 12 Id. 378; Clark v. Dibble, *supra*; Sally v. Capps, 1 Ala. (N. S.) 121; Barger v. Collins, 7 Har. & Johns, 213; Chase v. Garvin, 19 Me. 211; Gibson v. Moore, 6 N. H. 547; Collyer on Part., sec. 281, and citations.

An action at law for the balance struck will be maintained when there has been a final adjustment of the principal part of partnership accounts, leaving some debts outstanding, not embraced in the stated struck account. Brinley v. Kupfer, 6 Pick. 179; Sikes v. Work, 6 Gray, 433; Fink v. Ryan, 3 Scam. 322; Rockwell v. Wilder, 4 Met. (Mass.) 556; Williams v. Henshaw, 11 Pick. 79.

JOSEPH BOCNE for defendant in error.

To entitle one partner to sue his copartner on an account stated, something more is required than in the case of an account stated between strangers. An account stated is a demand on one side which is admitted on the other for a definite amount due. Powell v. Pacific R. R., 65 Mo. 658.

And the acknowledgment must be unqualified. Calvert v. Baker, 4 M. & W. 417; Evans v. Verity, R. & M. 239.

COLLIER, J.—The plaintiffs in error sued Sigmund Lindauer in the district court of Grant county describing themselves as Gustav Wormser and Isaac Wormser “partners doing business at the town of Deming in said county of Grant under the firm name and style of G. Wormser & Co.,” the action being assumpsit. The declaration alleges an indebtedness of \$8,713.12 upon open account, and with it was filed a verified account with the caption, “Mr. Sigmund Lindauer in

acct. with G. Wormser & Co. Dr.," showing debits and credits beginning with June 4, 1891, and extending down to October 1, 1894. The verification is by Gustav Wormser as a member of said firm and that Sigmund Lindauer is indebted to the firm of G. Wormser & Co., in said sum.

The plea in the general issue verified.

At the close of all the testimony the court below instructed the jury to find a verdict for the defendant which was done.

Motion for a new trial having been made and overruled, the cause is before us on writ of error sued out by plaintiffs in the lower court.

The evidence in this record shows that during and prior to the year 1891 Sigmund Lindauer, Gustav Wormser and Isaac Wormser, were copartners doing business under the firm name and style of Lindauer, Wormser & Co., and that on June 27, 1891, they entered into a written agreement that the firm of Lindauer, Wormser & Co., should "stand dissolved from and after July 1, 1891, the said Sigmund Lindauer withdrawing from said firm." It was further provided that Lindauer "has a one-third interest in the net assets of said firm" and that buildings, corrals, etc., should be appraised at \$24,000 or more as shown upon final accounting January 1, 1892. Then follows this clause of the written agreement for dissolution:

"In further ascertaining said assets, an account of all stock, merchandise, etc., shall be taken during the last week of December, 1891, books balanced, and profit and loss charged with bad accounts; the net assets thus ascertained to be the basis of settlement of division. That is to say Sigmund Lindauer withdrawing from the said firm July 1st, 1891, ceases to render services or draw any salary for services after said last mentioned date, but retains his one-third interest in the profits accruing from the continuing conduct of the business, up to and until January 1st, 1892, said continuing conduct being by the firm of G. Wormser & Co., composed of Gustav Wormser and Isaac Wormser parties thereto; it being fully under-

stood that said new firm of G. Wormser & Co., shall succeed to the good will of Lindauer, Wormser & Co., and shall have full authority to collect, pay and adjust all open accounts of or affecting Lindauer, Wormser & Co., and to do all things necessary to such collection, payment and adjustment, including the signing of the old firm's name. It is further agreed that Sigmund Lindauer retains his one-third of the profit and loss account, subject to and with right of proportionate share in any collections which may be made from said account, whether the same be made before or after January 1st, 1892." Omitting other clauses not material, the final paragraph reads as follows:

"The business will be continued by Gustav Wormser under the firm name and style of G. Wormser & Co., as aforesaid, for the best interests of all concerned, but it is understood that the dissolution of Lindauer, Wormser & Co., is absolute July 1st, 1891." Executed in triplicate, and signed by the three.

The testimony to establish the indebtedness claimed is to the effect that on January 1, 1892, the defendant owed to the partnership the sum of \$9,709.58, which sum was afterward reduced by one-third of amount collected from accounts carried to the profit and loss account to the sum sued for, the witness Gustav Wormser stating that Mr. Lindauer owed the firm of G. Wormser Co., on the last day of December, 1891, \$9,709.58. This witness shows, as does also the agreement that a large portion of this indebtedness accrued prior to July 1, 1891, and the entire indebtedness of \$9,709.58 was the amount on a balance agreed on between the witness and defendant in the final accounting contemplated by the agreement for dissolution, stock being taken and appraisement of buildings, etc., being made between witness, purporting to represent himself and Isaac Wormser and defendant as partners, and that the defendant recognized the balance struck and agreed to pay the same "some day."

Defendant denied that there was any final accounting or any striking of a balance, as was testified to by plaintiffs'

witnesses, or that he agreed to pay, and said that the conversation in relation to a final accounting had no such result. As to whether or not there was sufficient evidence to carry this case to the jury on the question of there being a final accounting and stated balance, which could be sued upon at law, it is not, under the view we take of this case, necessary to decide.

The important question this record presents is whether or not any right of action has been shown in favor of the plaintiffs as partners composing the firm of G. Wormser & Co. A consideration of the effect of the written agreement, of date June 27, 1891, providing for a dissolution and settlement of the affairs of the copartnership of Lindauer, Wormser & Co., appears to settle this question.

It is certain that this agreement states in terms that the firm and partnership of Lindauer, Wormser & Co., "shall be and stand dissolved from and after July 1st, 1891, the said Sigmund Lindauer withdrawing from said firm," and that an account of "all stock, merchandise, etc., shall be taken during the last week of December, 1891, books balanced, and profits and loss charged with bad accounts; and net assets thus ascertained to be the basis of settlement and division." Thus far it seems clear that a final accounting had in December, 1891, would be between three individuals, Sigmund Lindauer, Gustav Wormser and Isaac Wormser, composing that firm. If such final accounting were had who would have the right to sue? We find it stated in 17 Am. and Eng. Ency. of Law, p. 1270, that "after a balance has been struck, if assets of the partnership in excess of his share are in the hands of one partner, the claims of his copartners against him are several and not joint, and joint action can not be maintained upon them," and to this are cited *Riari v. Wilhelm*, 3 Gill. (Ind.) 356; *Farror v. Pearson*, 59 Me. 561; and *Masters v. Freeman*, 17 Ohio St. 323.

In *Riari v. Wilhelm*, supra, it is said that "the ground on which partners after dissolution can sue each other in relation to what had been partnership funds or effects, is, that the

joint interest as partners having ceased, a new contract had been made between the parties, in their individual, as distinct from their partnership, characters.

It might be as stated in some of the cases, that the debtor partner would, to equalize interests, owe one of his partners more than another, and thus if he happened to owe each the same, that would be a circumstance not at all militating against the position that the claims would be several and not joint. Concluding, therefore, that if the final accounting were between the partners composing the firm of Lindauer, Wormser & Co., the action would be several and not joint, let us see whether other provisions of the written agreement can make this action maintainable by the firm of G. Wormser & Co., as it has been brought.

It may be conceded, too, we think, that if instead of Lindauer continuing in partnership after July 1, 1891, with Gustav Wormser and Isaac Wormser as individuals, he became thereafter, until December 31, 1891, the partner of G. Wormser & Co., as a firm, and the entire assets of Lindauer, Wormser & Co., were turned over to the new partnership with the firm of G. Wormser & Co. to stand in the place of Gustav Wormser and Isaac Wormser, individuals, and the business of the old partnership to be continued, a final accounting of the affairs of the old and new concern might be had between Lindauer as one partner and G. Wormser & Co., as the other, if the agreement so meant to provide. Whether G. Wormser & Co., would have to sue as assignees or not, as to the old indebtedness, we need not here discuss. It can not be said he was a member of the firm of G. Wormser & Co., because the agreement expressly declares he is not. If he were, this would merely be the old partnership under a new name, and G. Wormser & Co., as a firm could not sue. If not a member of the firm of G. Wormser & Co., was he in partnership with the new firm, he being one member and it the other?

The agreement says "he retains his one-third interest in the profits of the continued conduct of the business by the

firm of G. Wormser & Co.” It is evident from the agreement that Lindauer is no longer to have a voice in the continued conduct of the business, and though having a joint proprietorship in the assets in the hands of the new firm, he exercises no proprietary rights. Joint ownership and participation in profits seems generally to create a partnership between the owners. As conversely stated at page 844 of vol. 17, Am. and Eng. Ency. of Law, “the receipts of a share of its profits as compensation for services as agent, clerk, manager, broker or other person acting in a fiduciary capacity is inconsistent with the idea of a joint proprietorship of the business and profits as such and does not constitute a partnership between the parties.” It may be, however, that one may be a joint proprietor of the assets of a business, but not necessarily a joint proprietor of the business itself. This would appear more clearly, if for example the capital stock were an ocean steamer owned by three persons, two of them managing the same, and the profits to be divided between the three, and this even though the law would as to third persons consider the three to be partners. The fact that the assets are a stock of merchandise, which changes in specifics, does not prevent the principle from applying. Thus it is laid down, *ibid*, page 842, that there is no partnership in cases of joint ownership, where a part of the profits is taken for rent, and to this are cited *Quackenbush v. Sawyer*, 54 Cal. 439; and *Chapman v. Eames*, 67 Me. 452.

This agreement specifically states that Lindauer merely retains a third interest in the profits, and excludes him from any control or direction of the business. Why is that not to be construed as an agreement to pay him one-third of the profits for the use by G. Wormser & Co., of his interest in the buildings, corral, etc., and the employment of his part of the capital invested in the stock of merchandise? We can not see what other construction can be placed on this agreement. If this be true, then it follows with irresistible logic that the final accounting made in December, 1891, if any were made, must have been between Sigmund Lindauer, Gustav Wormser and

Isaac Wormser, three individuals, and not between S. Lindauer and G. Wormser & Co.

This being so, it follows conclusively, that G. Wormser & Co., had no right of action against defendant in error on the testimony submitted.

For these reasons the judgment of the court below should be affirmed, and it will be accordingly so ordered.

Smith, C. J., Laughlin, J., concurring.

[No. 675. August 2, 1897.]

J. S. JARRELL, Appellant, v. R. F. BARNETT, ASSIGNEE OF W. C. BIRD & CO., Appellee.

No written opinion filed.

Held,—No reversible error.

Appeal, from a decree for defendant, from the Fifth Judicial District Court, Chavez County. Affirmed.

JAMES A. POAGE for appellant.

LAUGHLIN, J.—In this case the records disclose no reversible error, and the judgment of the lower court is therefore affirmed, with costs against appellant and sureties on his appeal bond. An order will be accordingly entered, a written opinion not required.

Smith, C. J., and Collier and Bantz, JJ., concur. Hamilton, J., did not sit in the case, having tried it in the court below.

[No. 650. August 2, 1897.]

IN RE JOSE F. JARAMILLO, Petitioner, HABEAS
CORPUS.

On motion for rehearing. Motion overruled. For former opinion see 8 N. M. 598.

CHILDERS & DOBSON for petitioner.

NEILL B. FIELD for respondent.

LAUGHLIN, J.—In this case the motion for rehearing is denied. An order will be made accordingly, a written opinion not necessary.

Smith, C. J., and the associate justices concur, except Collier, J., who was disqualified and did not sit.

[No. 673. August 5, 1897.]

EARLY TIMES DISTILLERY COMPANY et al., Appel-
lants, v. CHARLES ZEIGER et al., Appellees.

FRAUDULENT CONVEYANCE—BILL IN EQUITY BY GENERAL CREDITORS TO SET ASIDE—JURISDICTION.—If the remedy at law is not plain, adequate and complete, or if the creditor has a trust in his favor, in either case, he is not required to go first into a court of law, but may apply in the first instance to a court of equity for relief.

ID.—CONSTITUTIONAL LAW—JURY TRIAL.—The constitutional right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. *Burton v. Barber*, 104 U. S. 104.

Appeal, from a decree of the Second Judicial District Court, Bernalillo County, sustaining a demurrer to the bill. Reversed and remanded, with directions.

The facts are stated in the opinion of the court.

NEILL B. FIELD, B. S. RODEY and F. W. CLANON for appellant.

It is not necessary that a creditor shall have reduced his claim to a judgment before he can maintain a bill under the statute of 1889. *Griffith v. Cox*, 79 Ky. 564; *In re Klein*, 14 Fed. Cas. 718; *Barton v. Barbour*, 104 U. S. 133; *Shields v. Thomas*, 18 How. 261, 262; *Ward v. Farwell*, 97 Ill. 611; *Gormley v. Clark*, 134 U. S. 346; *Innes v. Lansing*, 7 Paige Chy. 585.

A. B. McMILLEN and CHILDERS & DOBSON for appellees.

The complainants are not judgment creditors, and, therefore, have no standing in a court of equity to contest the right of their alleged debtor to dispose of his property as he may see fit. 11 *Freem. on Executions*, sec. 430; *Talbot v. Randall*, 3 N. M. 226; *Taylor v. Bowker*, 111 U. S. 110; *Putney v. Whitmire*, 66 Fed. Rep. 110; *Scott v. Neely*, 140 U. S. 106; *Nat. Tube Works Co. v. Ballou*, 146 Id. 517; *Cates v. Allen*, 149 Id. 451; *Hollins v. Coal Co.*, 150 Id. 371.

To warrant the relief prayed for, the complainants must establish the fact that they were creditors of the defendant, Zeiger, at the time of the alleged fraudulent conveyance. But, to allow them to prove that fact in a chancery proceeding, would violate the seventh amendment to the constitution of the United States, and deprive defendants of their right to a trial by jury. *Scott v. Allen*, 140 U. S. 106; *Cates v. Allen*, 149 Id. 451; *Putney v. Whitmire*, 66 Fed. Rep. 517; *Coal Co. v. Snowden*, 42 Pa. St. 488; 82 Am. Dec. 530. See, also, *Walker v. Sauvinet*, 92 U. S. 9; *Edwards v. Elliott*, 21 Wall. 332; *Pearson v. Yewdall*, 95 U. S. 294; *Bump on Bankruptcy*, 209, and citations; 1 *Kent Com.* 388; 1 *Cooley's Const. Lim. Note*; 2 *Black.* 477; *State v. Bridge Co.*, 13 How. 563; *Parsons v. Bedford*, 3 Pet. (U. S.) 447; *Land Co. v. Bradbury*, 132

U. S. 509; Bump on Banks, 2245; In re Norris, 18 Fed. Cas. 317; In re Print. & Pub. Co., 18 Id. 780; Ins. Co. v. Comstock, 16 Wall. 259; Cooley's Const. Lim. 506.

Reply of appellants.

To argument of appellees by which they sought to show "that it would be inexcusable to contend that the right of trial by jury was not allowed in bankruptcy proceedings," under the early English statutes on the subject, appellants citing: 34 Hen. VIII., C. 4; 13 Eliz. C. 7; 1 Jas. C. 15; 21 Jas. C. 19; 5 Geo. II., C. 30; 49 Geo. III., C. 121; also Bill v. Beckwith, 3 Fed. Cas. 376; Goodenow v. Milliken, 10 Fed. Cas. 591.

HAMILTON, J.—This is an appeal from the district court of the Second judicial district for the county of Bernalillo. The complainants filed their bill on the chancery side of the court as general creditors of the defendant Zeiger, attacking a fraudulent conveyance alleged to have been made by the defendant and asked for a decree declaring the conveyance for the benefit of all the creditors under the statute. To this bill a demurrer was filed by the defendant Zeiger, based upon the ground that a court of equity had no jurisdiction to entertain a bill of this character. This demurrer was sustained, from which ruling of the court in sustaining the demurrer the defendants appealed.

It will be seen by the record in this case that the sole ground of attack made upon this bill is that the complainants are but simply general and not judgment creditors; that a general creditor will not be heard in a court of equity to attack and set aside a fraudulent conveyance made by his debtor until he has first obtained a judgment, issued execution thereon and had it returned nulla bona; that by the provisions of the constitution of the United States the right of trial by jury is preserved in suits at common law when the amount in controversy exceeds \$20, and that the act of the legislative assembly of the territory under which this bill is filed is violative of this

provision of the constitution, as it deprives the party of his right of trial by jury, and is, to that extent, void.

Stated as a general proposition, there can be no doubt that the well settled rule is, that if the creditor has a legal remedy, which is plain, adequate and complete, he must exhaust that remedy before he will be allowed admission into a court of equity. He should proceed upon the law side of the court, obtain his judgment, and have execution returned thereon

BILL to set aside
fraudulent
conveyance:
jurisdiction.

unsatisfied, as a condition precedent to enable him to attack by a bill in chancery the fraudulent conveyance of his debtor. While this position is true, it is also well settled by a line of authorities equally convincing and controlling, that if the remedy at law is not plain, adequate and complete, or if the creditor has a trust in his favor, then in either event he is not required to go first into a court of law, but may apply in the first instance to a court of equity for relief. The fact that the remedy at law may have been exhausted, or that it is wholly inadequate and incomplete, may be, and is, clearly and conclusively shown by the judgment, execution and return of nulla bona. The judgment, execution and return are but the best evidence of these facts, but they are not the only method or the only evidence by which it may be shown, that the remedy at law is wholly inadequate and incomplete. If the bill upon its face contains such allegations of fact that the court is enabled to see that there is no remedy at common law, or that the remedy at law is wholly inadequate and incomplete, or if the allegations of the bill show that the creditor has or claims a trust in his favor, or is seeking to establish his claim as against the trust property, and that the relief can only be made available in a court of chancery, then upon such a case being made by the bill, the court will not require him in the first instance to hazard his chances of recovery by a useless expenditure of time in obtaining an empty judgment and fruitless execution as a condition precedent to entertaining his bill. This we understand to be the settled doctrine of the

Federal courts. In Case v. Beauregard, 101 U. S. 688, the court in discussing this question, observes:

“When the debtor’s estate is a mere equitable one, which can not be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal process.* * * It may be said that, whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor’s property the reason given is that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien or trust, and shows that it can be made available only by the aid of the chancellor, it obviously makes a case for his interference.”

Also in the same book, page 1004, Co-operative Ed., Case v. N. O. & Carrollton R. R. Co., the court in discussing this question uses this language:

“But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, ‘*Bona sed impossibilia non cogit lex.*’ It has been decided that where it appears by the bill that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference.”

Also in the case of Consolidated Tank Line Company v. Kansas City Varnish Company, 45 Fed. Rep., page 16, was a bill by a general creditor to set aside an assignment upon the ground of fraud. The same objection was made there as in

the case at bar, that the complainant was not a judgment creditor, and therefore could not maintain the suit. The contention was overruled and the bill sustained. Judge Phillips, on pages 16 and 17, says:

“Looking to the foundation upon which the rule contended for rests, it ought not to apply where the judgment and execution would be fruitless.”

Also in the case of *Talley v. Curtain*, decided by the United States circuit court of appeals, 54 Fed. Rep., was also a bill by a general creditor to set aside an assignment upon the ground of fraud, and it was contended in that case that the complainant not having first obtained a judgment, could not come into a court of equity. This position contended for was overruled and the bill sustained.

The state of facts as disclosed by the allegations of this bill show that a judgment and execution at law would have availed the complainants nothing. They show that the remedy at law was not wholly inadequate and incomplete, but that there was no remedy at all. Under this state of facts, a court of equity is not justified in closing its doors, refusing to entertain jurisdiction of a case, and thus deprive the litigant of his only remedy to obtain redress.

As we have before stated, if the bill shows that a creditor has a trust in his favor, or if he is seeking to establish an interest in his favor in the property of the debtor, held in trust for his benefit, and is asking to have the distributive share to which he may be entitled paid to him out of that trust property or its proceeds, then it is clear that a proceeding at law could avail him nothing, and a court of equity is the only tribunal capable of rendering him this relief. In the case of *Russell v. Clark's Executor*, 7 Cranch, 87, Chief Justice Marshall lays down the rule:

“If a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court which would not require that the claim should be first established in a court of law.”

Also in the case of *Oelrichs v. Spain*, 15 Wallace, 228, the court observes:

“Where the remedy at law is of this character (plain, adequate and complete), the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issues of fact by a jury. But this principle has no application to the case before us. Upon looking into the record, it is clear to our minds, not only that the remedy at law would not be effectual as the remedy in equity, but we do not see that there is any effectual remedy at all at law. Besides there is an element of trust in the case which, wherever it exists, always confers jurisdiction in equity.”

(See, also, *Case v. N. O. & Carrollton R. R. Co.*, 101 U. S. *supra*.)

What is the case as made by this bill? It alleges in substance that the defendant Zeiger is indebted to the complainant, the Early Times Distillery Company, in the sum of \$6,731.88, evidenced by acceptances; that he is also indebted to other complainants in various sums stated, evidenced by promissory notes. It further alleges that he was also indebted to the First National Bank of Albuquerque in the sum of \$25,000; due really to the bank. It is also charged in the bill:

“Complainants state that the said deed of trust in the last paragraph mentioned was made by said defendant, Zeiger, and was an act and device done and resorted to by said Zeiger, in contemplation of insolvency, and with the design to prefer the said defendant, the First National Bank of Albuquerque, to the exclusion in part of these complainants and all other creditors of said Zeiger, and they further allege that the said deed of trust was not made in good faith to secure any debt or liability created simultaneously therewith, but for the use and benefit of the First National Bank of Albuquerque aforesaid, on account of the pre-existing indebtedness of said Zeiger never actually received from the said Lesguereaux the said sum of \$15,000 in said deed of trust, on any part thereof.”

The bill prays that a receiver be appointed to take charge of the property covered by the mortgage, and that it may be administered and distributed under the direction of the court, in accordance with the provision of the act, to all the creditors alike, and asks to have the deed of trust or mortgage decreed void.

The act of the legislature upon which this bill is filed provides in section 1, Acts of 1889:

“Every sale, mortgage or assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor in contemplation of insolvency and with the design to prefer one or more creditors to the exclusion in the whole or in part of the others, shall operate as an assignment and transfer of all the property and effects of such debtor and shall inure to the benefit of all his creditors (except as hereinafter provided) in proportion to the amount of their respective demands, including those which are future and contingent, but nothing in this act shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record forthwith in the office of the county recorder where the property described therein shall be situated.”

Section 2 of the act provides, that all such transfers as are decreed void are to inure to the benefit of all creditors generally, and are to be subject to the control of a court of equity upon the bill filed by any person interested, and that such suit must be brought within six months after such conveyance is lodged for record. Section 3 provides that a number of creditors may unite in filing of said bill.

Viewing this act of the legislature as a whole, it must be regarded as an insolvency or bankruptcy law. The clear intent and purpose of the act is to prevent an insolvent and failing debtor from making a fraudulent transfer of his property, and from giving a preference to one creditor. It is intended by this act to secure an equal distribution of all of the failing debtor's property between all the creditors. To accomplish

this end, a court of equity is vested by the express terms of the act with jurisdiction, at the instance of any creditor, to entertain a suit to set aside such transfers, to take hold of the property of the debtor so attempted to be conveyed, and administer it as a trust fund for the benefit of all the creditors. The act in express terms declares: "Such mortgage or assignment, etc., made in contemplation of insolvency with the design to prefer one creditor over another shall inure to the benefit of all the creditors alike."

Is there not, therefore, an element of trust in a suit brought under this statute such as a court of equity alone can enforce? By the act of the debtor in assigning or mortgaging his property, in violation of the provisions of this statute, does he not thereby, by his own act convert his property into a trust estate for the benefit of all the creditors alike; or, rather, it may be said, that when the insolvent debtor thus fraudulently conveys his property the statute then converts that property into a trust estate, a trust in which each creditor has an interest, and any creditor, within the time limited by the statute, may proceed in a court of equity to have the trust declared and the property taken charge of by the court and administered to all the creditors.

But it is contended that the defendant is entitled under the statute to have a court of law pass upon the question as to whether the debt is due from him to the complainant, and therefore a court of equity has no jurisdiction. The objection to this contention is, that it is not the existence or nonexistence of the debt claimed to be due to any particular creditor which gives the court of equity jurisdiction, but it is the act of the debtor in making the fraudulent conveyance and giving the preference which gives the equity jurisdiction. If the debtor is insolvent or in contemplation of insolvency and makes the conveyance giving preference, the trust is then created in behalf of all of the creditors, and any one or all of them may proceed to have the trust declared, and the property proportionately administered. The insolvency of the debtor, and the conveyance and fraudulent preference, are the essential things

to be investigated which give the equity jurisdiction. Though the court might determine that a particular claimant or set of claimants were not, in fact, creditors, yet the court having once acquired jurisdiction of the trust estate the failure of any creditor or creditors to establish his or their debt could not oust the jurisdiction, and the court would not abandon it but would proceed to administer and distribute the fund to such as show themselves valid creditors and entitled to the distribution. It may be said that the creditor has a remedy at law by attachment, based upon the fraudulent conveyance. This remedy may be available but it is neither adequate nor complete. Suppose the attachment creditor be successful in sustaining the attachment and setting aside the conveyance, what then becomes of the property? He can not apply it to the satisfaction of his attachment, because each creditor has an interest in the property as a trust estate and is entitled to his pro rata share. The court of equity is the only tribunal capable of effectually handling and administering such property. A court of law can have no concern with the administration of the estate of an insolvent under such a statute as this, as its complicated machinery is not adapted to the ends sought to be accomplished—of declaring and enforcing the trust on behalf of the creditors and administering and distributing the property thereunder.

It is urged with great earnestness that the act deprives the party of his constitutional right of trial by jury, and is therefore void. This argument proceeds upon the theory that the ascertainment of the debt due to the creditor is the only thing to be determined. The trust feature of the case which is always a subject of equity jurisdiction, is ignored. The right of trial by jury as an absolute right never extends to a case of equity jurisdiction. In the case of *Burton v. Barber*, 104 U. S. 133, it is said:

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law: jury trial.

“But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction.

If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity."

It may be, in this connection, suggested that as the allegations of the bill are admitted by the demurrer, there is no necessity for a jury to ascertain the liability of the defendant or the amount of his indebtedness to the complainant—and further if a judgment creditor by virtue of his lien acquires the right to proceed, in equity to enforce it against the debtor, and thus bestows the jurisdiction to administer the estate without the intervention of a jury, it would seem that the debtor is not damaged if a similar result should ensue from his recognition of the complainant's demand.

It is claimed by the appellees that the case of *Scott v. Neely*, 140 U. S. —, and the case of *Carter v. Allen*, 149 U. S., are controlling upon us in the determination of the question now before us. These cases both arose under a statute of Mississippi, which provides as follows:

"The courts shall have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or, having judgments, have not had executions returned unsatisfied, to set aside fraudulent conveyances of property or other devices resorted to for the purpose of hindering, delaying or defrauding creditors and may subject the property to the satisfaction of the demands of such creditors, as if the complainant had a judgment and execution thereon returned, 'no property found.' "

An examination of the statute shows that it bears little or no resemblance to the statute under consideration. By this act the legislature of Mississippi attempted by statute to vest the court with the power to declare a conveyance fraudulent and decree a lien upon and give preference to a particular creditor to the exclusion of all other creditors. It thus attempted by statute to vest a court with power to do what it said the debtor could not do; that is, take the property of the insolvent debtor from one creditor and give it to another. There is no element of trust in this statute. There is no provi-

sion that in case of a fraudulent preference by an insolvent debtor a court of equity, at the instance of a creditor, might take charge of all the assets of a debtor, declare the conveyance fraudulent, and administer the property for the benefit of all the creditors.

In the case of *Talley v. Curtain*, *supra*, the circuit court of appeals had under consideration a case of the same character as the one at bar, and it was contended in that case that the case of *Scott v. Neely* was decisive of the question. The circuit court of appeals, in discussing the case of *Scott v. Neely*, say:

"*Scott v. Neely* held that the Mississippi statute could not create or confer such a jurisdiction on a court of equity of the United States, and that a court of equity of the United States could not entertain such a suit, because, upon a demand like this, the adverse party had the right under the constitution, to his trial by jury. There was no trust. The claim of complainants was strictly on the money demand, the larger portion not liquidated, consisting of an account of advances, interests, credits, and charges. No part of the debt was admitted. It had to be established and proved after opposition and litigation. The contract itself must have been proved. There was nothing to show why the remedy at law was not plain, adequate and complete. The complainants had first to prove their case, then to set aside the deed; and they claimed that they could enter judgment and secure the first lien. The complainants had no lien on or interest in the property. The main issue in the case was whether the courts of the United States could and would enforce the state statute. It seems to be admitted on all sides that without such a statute the court had no jurisdiction. * * * But this denial can not defeat the trusts, if any exist, nor affect creditors who have come in under this creditors' bill, nor defeat the jurisdiction, which does not depend upon the attitude of the complainants. The aid of the court has been sought to construe a trust. Having jurisdiction to do this—its peculiar province—it can go

on, and give such relief as it may think proper upon the whole case."

On page 48, the court continuing, also says:

"If, then, the case comes within the normal jurisdiction of a court of equity of the United States, either because it deals with trusts and equitable assets, or because complainants have no plain, adequate and complete remedy at law, we escape the provision of the constitution relied on. This provision, correctly interpreted, can not be made to embrace the established exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law; but it should be understood as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law."

See, also, *Shields v. Thomas*, 18 How. (U. S.) 262.

The case of *Peters v. Bain*, 133 U. S. 670, was also a case involving the same principle as the one which we are now discussing. The bill was sustained in the circuit court of the United States, in the opinion rendered by Chief Justice Waite; an appeal was taken to the supreme court of the United States, and neither the circuit court nor the supreme court made any question as to the equity jurisdiction of the court.

By a reference to the case of *Talley v. Curtain*, United States circuit court of appeals, it will be seen that that court reviewed the case of *Scott v. Neely*, and held that the principle as there announced under the statute of Mississippi could not be made to apply to a statute involving a general assignment for the benefit of all creditors. A fraudulent conveyance made by a failing debtor in violation of the statute operates as a general assignment of the property for the benefit of all creditors, and the same rule will apply. I do not regard therefore, the cases of *Carter v. Allen* and *Scott v. Neely*, as authority for construing our statutes. See, also, the case of *Consolidated Tank Line Company v. Kansas City*, *supra*,

45 Fed. Rep. 16, which is a case under a Missouri statute similar to ours.

If the contention contended for the appellees is to be adopted, that a creditor must resort to the law side of the court, and obtain his judgment and execution before he can attack the fraudulent conveyance of his debtor, then the statute would fail of its object, as the suit must be brought to set aside the conveyance within six months, and if the defendant contests the claim this time would always lapse before the creditor could get his judgment and execution, and the door would be closed against his right to attack the fraudulent conveyance. The language of the supreme court of Kentucky in construing this statute in the case of *Griffith v. Cox*, 79 Ky. 564, is, we think, applicable here:

“* * * Courts of equity are expressly given jurisdiction and control of such transfers upon the filing of a petition by any person interested within six months after the mortgage or transfer. Any person or persons interested, no matter whether their interest be manifested by judgments or otherwise, may unite in the petition.

“As the petition must be filed within six months after the mortgage or transfer shall have been lodged for record or the delivery of the property or effects transferred, to require a judgment and return of no property found before the petition shall be filed would render the statute almost useless, and defeat many creditors by the delays which could be resorted to by debtors to prevent such judgments and returns before the expiration of six months.”

The object of the statute under consideration is to prevent an insolvent debtor from making a fraudulent conveyance and transfer of his property and from giving a fraudulent preference to one creditor to the exclusion of others. It is to secure an equal and fair distribution of all his assets to all the creditors alike. The case as made by the bill seeks to secure this end, and contains an element of trust in favor of the complainants and all other creditors and shows the remedy at law to be wholly inadequate and incomplete. It therefore furnishes the

strongest ground for exclusive equity jurisdiction in the first instance, without resort to the judgment and execution at law. The case is not one, therefore, where the party has the right to demand a jury trial.

The cause is reversed and remanded, with directions to the court below to overrule the demurrer and allow the cause to proceed.

Smith, C. J., Laughlin, J., and Bantz, A. J., concurring.

[No. 674. August 5, 1897.]

EARLY TIMES DISTILLERY COMPANY et al.,
Appellants, v. CHARLES ZEIGER et al., Appellees.

The decision in this case follows the opinion in *Same v. Same*, No. 673, 9 N. M., ante page 31.

Appeal, from a decree of the Second Judicial District Court, Bernalillo county. Reversed and remanded with directions.

NEILL B. FIELD, B. S. RODEY and F. W. CLANCOY for appellant.

A. B. McMILLEN and CHILDERS & DOBSON for appellees.

HAMILTON, J.—This is an appeal from the Second judicial district court of the territory of New Mexico. The case is of the same character as case No. 673, bearing the same title. The decision in this case follows the opinion rendered in No. 673.

The cause is reversed and remanded with directions to the court below to overrule the demurrer and allow the cause to proceed.

[No. 715. August 5, 1897.]

F. L. PEARCE, Plaintiff in Error, v. W. S. STRICKLER,
Defendant in Error.

PRACTICE, TRIAL—ERROR, WRIT OF—TIME FOR TAKING.—Where defendant failed to give notice of intention to file a motion for new trial, the year from final judgment, limited for appeal or writ of error, did not begin to run till the determination of the motion, though judgment was entered on the same day the verdict was returned under the rule of the court requiring it.

ID.—MOTION FOR NEW TRIAL—POSTPONEMENT OF CONSIDERATION.—Where the court entertained a motion for new trial, the mere failure of the court to pass upon the motion within the thirty days required by rule of court did not operate to divest jurisdiction over it, but is rather to be construed as deferring its action upon it for good cause, within its power, to further consider the motion.

Error, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County. Motion to dismiss writ overruled.

The facts are stated in the opinion of the court.

H. L. WARREN for plaintiff in error.

W. B. CHILDERS for defendant in error.

BANTZ, J.—The question now to be determined arises on a motion to dismiss the writ of error on the ground that it was not brought till more than one year after the final judgment was rendered in the court below. The judgment was entered February 6, 1896. The writ of error was sued out on March 10, 1897, and was lodged in the office of the clerk of the district court on March 20, 1897. The judgment had been entered on the same day the verdict was returned, under a rule of court which required that to be done when the party failed to give notice of intention to file motion for new trial. Rule

WRIT of error:
time for taking.

29, par. 1. The motion was, however, filed (February 8th) during the term, and within five days after verdict, as provided by rule. Rule 29, par. 2. On February 15, 1896, the motion was continued by an order as follows: "It is ordered by the court that the time for arguing and submitting" said motion "and the disposition of the same be, and the same hereby is, extended and continued for thirty days." This continuance carried the cause from a special into the regular March term. The motion was overruled March 27, 1896. The period of limitation runs from the day of final judgment to the time when the writ of error was lodged in the court below. *Polleys v. Improvement Co.*, 113 U. S. 81. It therefore becomes necessary to determine when the judgment became final in the court below; and of course, if this occurred when the judgment was entered (February 6, 1896), the writ of error was barred. At common law the judgment was not entered until the conclusion of the cause, and therefore not until the motion for a new trial had been determined. Under our practice the rule is otherwise, and the judgment may be immediately entered upon the verdict, and the motion for a new trial may be made and passed upon afterwards. When the motion is filed in proper time, the proceeding is in fieri until the motion is denied; and until then the judgment must be considered as in paper, or as suspended as a roll, in the common law sense, by the motion. *Spanagel v. Dellinger*, 34 Cal. 482; *State v. Kansas City Court of Appeals* (Mo. Sup.), 16 S. W. 415; *Higginbotham v. Campbell* (Ga.), 11 S. E. 1027; *Wheeler v. Barr* (Ind. App.), 33 N. E. 975. The third paragraph of rule 29 provides that every such motion shall be argued or submitted and determined during the term at which the case is tried, unless the court, for good cause, expressly continue it. A failure by the court to pass on or continue such motion during the same term at which the case has been tried shall be considered as a denial of the same, and no continuance of such motion shall be for a longer period than thirty days after the expiration of

MOTION for new trial: postponement of consideration.

the term. Such is the substance of the rule, and under it it will not be necessary to say in this case whether the pendency of a motion for new trial will suspend a judgment beyond the term, where the motion has not been passed upon or specially continued; nor will it be necessary to say whether an order continuing such motion for a longer period than thirty days would be a nullity or merely an error. In this case the motion was filed in proper time, and could have been filed without leave first had, and was expressly continued for thirty days, so that the jurisdiction of the court to amend or set aside the judgment was preserved notwithstanding the lapse of the special term. *Sage v. Railroad Co.*, 93 U. S. 418. But it is contended by the defendant in error that when the period of thirty days expired (March 16, 1896), the judgment became final by operation of the rule last mentioned. The order expressly provides that the motion is continued for argument, submission, and disposition by the court. It would seem, therefore, to be clear that the court did entertain the motion, and we do not think that the mere failure of the court to pass upon it within the thirty days operated to divest jurisdiction over it, but rather that the court deferred its action upon it for good cause, within its undoubted power to thus further continue the motion. A construction which would deprive the court of jurisdiction of a motion while the court was entertaining it would be highly penal, and is unwarranted by the language of this rule. In *Smelting Co. v. Billings*, 150 U. S. 36, 14 Sup. Ct. 6, a decree was entered dismissing a bill in equity, and a motion was then made for a rehearing, which was not passed upon until some six or seven months afterwards. It was contended that limitation ran from the date of the decree, and not from the date of overruling the motion, but the supreme court of the United States says: "The rule is that if a motion or petition for a rehearing is made or presented in season, and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for purposes of the writ of error or

appeal. *Brockett v. Brockett*, 2 How. 238; *Railway Co. v. Murphy*, 111 U. S. 488, 4 Sup. Ct. 497; *Memphis v. Brown*, 94 U. S. 715." The judgment in this case did not become final until the motion for a new trial was determined, and the year for suing out the writ of error did not begin to run until then. The motion to dismiss will therefore be overruled.

Smith, C. J., and Collier, Hamilton and Laughlin, JJ.,
concur.

[No. 664. August —, 1897.]

THE CERRILLOS COAL RAILROAD COMPANY,
Plaintiff in Error, v. JOSEPHINE DESERANT,
ADMINISTRATRIX OF HENRI DESERANT,
Defendant in Error.

NEGLIGENCE—EVIDENCE—WAIVER.—In an action for damages, by the administratrix of a deceased person, against defendant for negligence, in causing the intestate's death in its mine, as the result of an explosion in the vicinity of the room where intestate was working, of the danger of which intestate had been apprised by the presence of a danger signal placed there by defendant's fire boss, and accepted employment,—Held: That defendant was not guilty of negligence of which plaintiff's intestate could complain, having accepted employment with an implied waiver as to there being standing gases in places in defendant's mine. If injury resulted from a fellow servant's act under such circumstances, it must be considered to have arisen from the risk incident to the employment.

ID.—INSTRUCTIONS.—Where two theories were advanced by plaintiff and defendant, respectively, as to the cause of the explosion, and it was not clear upon which theory the jury found defendant liable, the court erred in not clearly drawing their attention to the law applicable to both theories.

ID.—INSTRUCTIONS.—Instructions, the general import of which, relating to the duty of defendant, was not that reasonable diligence and care should be exercised by defendant in an endeavor to perform its duty, but that the duty must be performed or defendant be deemed guilty of "culpable negligence," were erroneous.

ID.—INSTRUCTIONS.—In such case, where no attack was made upon the system or plan of ventilation, it was misleading and error to instruct the jury that it was incumbent on defendant to use necessary and suitable machinery for forcing a sufficient quantity of pure air into the mine.

ID.—INSTRUCTIONS.—An instruction that it was incumbent on defendant to keep open all air courses, etc., in said mine for the proper circulation of the air while the men were at work, and provide a sufficient amount of pure air for the safe and proper ventilation of the mine, for the protection of the men so working, was faulty in implying that defendant guaranteed these things.

ID.—INSTRUCTIONS—MEASURE OF DAMAGES.—It was error to instruct the jury that a nominal plaintiff could recover for loss of comforts and protection.

ID.—MEASURE OF DAMAGES.—In statutory actions for injuries causing death the rule is that the damages recoverable is compensation for the pecuniary loss to the parties entitled to recover; and if there are any aggravating circumstances attending the wrongful act or neglect of duty for which the defendant is responsible, then exemplary damages may be added.

Error from a judgment for plaintiff, to the First Judicial District Court, Santa Fe County. Reversed and remanded, with directions.

The facts are stated in the opinion of the court.

HENRY L. WALDO and R. E. TWITCHELL for plaintiff in error.

The instructions given by the court do not in any wise state the law as to proximate cause. C. N. O. & T. P. R'y Co. v. Mealer, 50 Fed. Rep. 725; Scheffer v. R'y Co., 105 U. S. 249.

When an injury may have come from either one of two causes, either of which may have been the sole proximate cause, it devolves upon plaintiff to prove by a preponderance of the evidence that the cause for which the defendant was liable was culpable and the proximate cause. 25 Am. and Eng. R. R. Cas., 358. See, also, Scheffer v. R'y Co., supra; R. R. Co. v. Kellogg, 94 U. S. 469; Bish. on Non-Contract Law, secs. 41-48; R. R. Co. v. Flint, 18 Am. and Eng. R. R. Cas., 263;

Seale v. R. R. Co., 65 Tex. 274; Washington v. R. R. Co., 10 Am. and Eng. R. R. Cas., 749; Carter v. Towne, 98 Mass., 96 Am. Dec. 882; Cuff, Admx. v. R. R. Co., 35 N. J. Law 30.

There was error in the court's instruction that the jury might find exemplary or punitive damages as a punishment. Cleghorn v. R. R. Co., 56 N. Y. 44; R'y Co. v. Prentice, 147 U. S. 101; Hagan v. R. R., 3 R. L. 88-91; 1 Sedg. on Dam. [8 Ed.], sec. 380.

The words "exemplary" and "punitive" have a distinctive legal meaning. R. R. Co. v. Liddell, 2 S. E. 855, sub-head 5.

The court erred in instructing the jury that, in considering the question of damages, they might take into consideration the loss of comforts and protection to plaintiff, etc., as might seem proper under the circumstances. C. & P. R. R. Co. v. Rowan, 66 Pa. St. 393; Donaldson v. R. R. Co., 10 Ia. 280; Telfer v. R. R. Co., 30 N. J. Law 198; Chicago v. Morris, 26 Ill. 400; R'y Co. v. Shannon, 43 Id. 346; R'y Co. v. Sweet, 45 Id. 204; Conant v. Griffin, 48 Id. 412; Chicago v. Sholton, 75 Id. 468; R. R. Co. v. Robinson, 44 Pa. St. 178; R. R. Co. v. Butler, 57 Id. 338; R. R. Co. v. Polk, 24 Ga. 366; R. R. Co. v. Barron, 5 Wall. 93; Moffat v. Tenney, 30 Pac. Rep. 348.

NEILL B. FIELD and F. W. CLANCY for defendant in error.

Where duties are imposed in furtherance of the public policy of the state, any violation of such duties from which injury results is negligence per se. Tied. on Lim. Pol. Power, sec. 98; 1 Thom., Neg. 558; Carroll v. R. R. Co., 38 Ia. 122; Reynolds v. Hindman, 34 Id. 146; R. R. Co. v. Stinger, 78 Pa. St. 225; Messenger v. Pate 42 Ia. 445; R. R. Co. v. McDonald, 152 U. S. 281; R. R. Co. v. Reesman, 60 Fed. Rep. 376.

That Flick and Kelly were fellow servants of deceased is wholly immaterial. R'y Co. v. Cummings, 106 U. S. 702; R. R. Co. v. Callaghan, 56 Fed. Rep. 993, 994; Lane v. Atlantic Works, 111 Mass. 136; Elmer v. Locke, 135 Id. 575;

Griffin v. R. R. Co., 148 Id. 143; Harriman v. R'y Co., 45 Ohio St. 31; Booth v. R. R. Co., 73 N. Y. 40; Cone v. R. R. Co., 81 Id. 206; Ransier v. R. R. Co., 32 Minn. 335.

The court could not lawfully have refused to instruct that the jury might give exemplary damages. R. R. Co. v. Barron, 5 Wall. 90, 91; R. R. Co. v. Rowan, 66 Pa. St. 399; Donaldson v. R. R. Co., 18 Ia. 283; McClain's Code, Iowa, sec. 3731; Telfer v. R. R. Co., 30 N. J. Law 199; R. R. Co. v. Polk, 24 Ga. 362; Kesler v. Smith, 66 N. C. 155, 156; R'y Co. v. Miller, 2 Colo. 464; Long v. Morrison, 14 Ind. 598; March v. Walker, 48 Tex. 372.

Exemplary and punitive damages are the same. Anderson, Law Dic. 306; Day v. Woodworth, 13 How. 371.

There is no error in the instructions of the court as to what the jury might consider in assessing the damages. Laws 1891, 101; Tilley v. R. R. Co., 24 N. Y. 475; Same v. Same, 29 Id. 285; R. R. Co. v. Kelly, 29 Md. 279; Ihl v. R. R. Co., 47 N. Y. 295; Ewen v. R'y Co., 38 Wis. 624; R. R. Co. v. Wightman, 29 Gratt. 443; R. R. Co. v. Goodman, 62 Pa. St. 339. See, also, R. R. Co. v. Barron, 5 Wall. 97; R'y Co. v. Needham, 52 Fed. Rep. 377, 378.

COLLIER, J.—For convenience the parties to this record will in this opinion be referred to as they appeared in the lower court, i. e. plaintiff in error will be called defendant and vice versa.

This is an action by the administratrix of Henri Deserant, deceased, against the Cerrillos Coal Railroad Company in which damages are claimed for negligence in causing death in its mine, called the White Ash Mine, on Wednesday, February 27, 1895, as a result of an explosion occurring about 10:45 o'clock in the forenoon.

The declaration charges the negligence in various ways conducing to bring about or cause said explosion, but the evidence will be at present considered only as it bears upon the theory which plaintiff's counsel have most insistently urged upon us.

This theory is that in room eight (8) of the fourth left entry of said mine defendant negligently permitted to accumulate, and to remain standing for at least forty-eight hours prior to the explosion, gas, in dangerous quantity and ratio to the surrounding air and explosion, in the presence of the ordinary naked lighted miner's cap lamp, and that the same was exploded by employees of the company, producing after damp, fatal to life, and causing the death of plaintiff's intestate in room 17 of said fourth left entry, the working place to which he had been sent by defendant.

It appears that by this explosion, all the employees, twenty-three in number, who were at the time in the fourth left entry (except those in what was called the plane) were killed, and therefore all evidence to show how the explosion occurred and where was its initial point is necessarily circumstantial. The fire boss was an employee whose duty it was to inspect the working places and inform miners, like deceased, who work by contract, i. e. were paid according to the quantity

NEGLIGENCE:
evidence:
waiver.

of coal mined, of the condition as to safety of their working places; and he told, or as he expresses it, he must have told the deceased, that his working place was safe when he went to work at 7 o'clock on the morning of the explosion. As to this duty the fire boss must be considered, we think, beyond question as representing the defendant. Thus it is expressly held in *Cullen v. Norton*, 52 Hun. 9, that a foreman intrusted with the performance of work stands in the place of and represents the master in assigning the servant to his place of labor, and in *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 642, it is held that, "if no one is appointed by a railway company to look after the condition of its cars, and see that the machinery and appliances used to move and to stop them are kept in repair and good working order, it is liable for the injuries caused thereby. If one is appointed by it charged with that duty and the injuries result from his negligence in its performance the company is liable. He is so far as that duty is concerned the representative of the company."

The fire boss had, in his round of inspection two days before the explosion, discovered standing gas in said room 8, how much does not appear, which caused him to place therein a danger signal, being what is known as the fire boss's danger mark, a double X or XX with date and initial letters of his name. It is shown that such a signal was well understood by all employees to be an imperative command forbidding entrance with a naked light into any room or place where danger was thus indicated. The fire boss did not go again into room 8 until after the explosion, nor is there anything to show that any effort was made to clear this room of standing gas, which by means of the safety or davy lamp he had detected there, notwithstanding that room 8 was considered the worst room in the mine for generating gas. It does not appear in precisely what place in room 8 the danger signal was placed, the fire boss merely saying it was "above the last cross-cut." After the explosion there were found in this room the corpses of two miners, Kelly and Flick, that of Kelly in the cross-cut and that of Flick in the center of the track about the end, that is half way up between the cross-cut and the face of the room, about forty-five feet from the cross-cut. A tie with fire danger mark on it was found lying across the track opposite the cross-cut. The track was partially taken up; there were implements there commonly used for such purposes, and there were there also two miners' caps and the lamps which carry a naked light, which indicated that Kelly and Flick had gone to room 8 to take up the track and had partially succeeded when the explosion occurred. According to the plan of ventilation the air should, as to the rooms in the fourth left entry, have gone first to room 18 and by brattice or curtains been carried around its face, thence by cross-cut to room 17, carried around its face and so on to the rooms lower numbered in consecutive order, until arriving at the third left entry air course, being drawn through all air courses and entries by an exhaust fan at its exit from the mine.

It is agreed also between all witnesses that a gas explosion in a mine invariably flies against the air, and therefore if there

were an explosion in room 8, it would have flown towards room 17 where the body of plaintiff's intestate was found, if air were circulating, as the testimony shows, through the fourth left entry of said mine. Defendant produced a considerable amount of evidence showing air circulation, and what was produced by plaintiff tended to show at most only a partial obstruction of the fourth left air course, diminishing but not destroying the current, the effect of which will be considered in another place in this opinion. We may assume, therefore, that there was undoubtedly some air current, because this seems necessary for plaintiff's theory of the effect of the explosion being carried back to room 17, and, further, because there is nothing tending to show the entire absence of an air current going in the direction intended.

The rule adopted in the White Ash Mine of the fire boss making rounds of inspection, and advising miners as they went to work of the condition of their places as to safety, and the fact that all employees well understood that danger signals were used in the mine to prevent entrance into particular places or rooms, presupposed that deceased and his co-employees knew that work was or might be carried on without cessation, though there might be standing gas in places or rooms of the mine, and that they understood, when informed that their working places were safe, that such representation did not mean there was no standing gas in the mine or in any particular entry of the mine. It can hardly be denied that, if the fire boss on the morning of Deserant going to work in room 17, had expressly told him there was standing gas in room 8, but it was marked with a danger signal, and Deserant had nevertheless gone in his place to work, the presence of such gas could not be urged as negligence by defendant causing his death, unless it were also shown that the room was not danger marked. If the evidence shows that he impliedly agreed to such a condition the same conclusion should follow. In *Sullivan v. India Mfg. Co.*, 113 Mass. 396, Devens, J., states the rule to be that "where the servant assents to occupy the place prepared for him and incur the danger to which he

will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might with reasonable care and by a reasonable expense have been made safe. His assent has dispensed with the performance on the part of the master to make it so. Having consented to serve in the way and manner in which the business was conducted, he has no ground of complaint even if reasonable precautions have been neglected." If in the case at bar "the business was conducted" by placing a danger signal where there was standing gas, and it will not do to say the defendant should in addition have placed a man on duty to watch and warn against entrance with naked light, because it might be thought as a reasonable precaution such was demanded. In *Naylor v. R'y Co.*, 11 N. W. (Mich.), it is held that "if a servant, knowing the hazard of his employment as the business was conducted, is injured, while employed in such business, he can not maintain an action against the master for such injury, because he may show there is a safer mode in which the business might have been conducted, and that had it been conducted in that way he would not have been injured." To the same effect also is *Hewett v. R'y Co.*, 34 N. W. (Mich.) 659. In *Sheets v. R'y Co.*, 39 N. E. (Ind.) 154, it was ruled, that "where the foot of deceased was caught in an unblocked switch, and he is run upon and killed by the careless act of the engineer in kicking cars with great and unnecessary force, the railway company was not liable because it was the act of fellow servant, and the fact of the frog being unblocked does not change the rule, as that was a danger known to the deceased, making the accident a risk incident to the service." Before that the Indiana supreme court held to the same effect in *R'y Co. v. Henderson*, 33 N. E. 1021, where the defect, known to the plaintiff and defendant alike, was in the roadbed. The two cases just cited show defects which it was the plain duty of the master to have remedied, but knowledge and an appreciation of danger by plaintiffs were held to defeat their action.

It is not suggested anywhere in argument that Deserant did not thoroughly realize that, if an explosion occurred from standing gas in the vicinity of his working place, his life would be endangered. He was a man fifty-three years of age, was a miner by occupation and had worked formerly in the White Ash Mine, and, again, for seven weeks immediately prior to his death. It can scarcely be thought that, if he supposed that the danger signals were negligently or willfully disregarded his life would not be jeopardized by explosive gas.

To similar effect of the cases above cited are those of *Ladd v. R. R. Co.*, 119 Mass. 412; *Hayden v. R'y Co.*, 29 Conn. 548; *Goltz v. R'y Co.*, 44 N. W. (Wis.) 752, and *Holey v. Lumber Co.*, 51 N. W. (Wis.) 321. Our supreme court has also held, that the "rule of law perfectly well settled" is as follows: "If the servant, before he enters the service, knows, or afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover that the building, premises, machine, appliance, or fellow servant, in connection with which, or with whom he is to labor, is unsafe or unfit in any particular, and if, notwithstanding, such knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him." *Alexander v. Mining Co.*, 3 N. M. (Gild.) 255.

In the case of *B. & O. R'y Co. v. Baugh*, 149 U. S. 368, it is said that "where the master has performed his duty in providing his servant with a reasonably safe place at which to work, he is not liable to any one of his servants for the acts or negligence of any mere fellow servant or co-employee of such servant where the fellow servant or co-employee does not sustain a representative relation to the master." Again in the *Baugh* case it is said, "if the act of one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master, but if it be not one in the discharge of such positive duty, then there

should be some personal wrong on the part of the employer before he is held liable therefor."

If the doctrine laid down by the Massachusetts supreme court in the Sullivan case, *supra*, is correct, and the defendant had complied with its positive duty to the satisfaction of plaintiff's intestate, there was certainly no personal wrong done by it, and then if explosion came from ignition by the naked lamp of Flick or Kelly entering room 8, that was the act of negligence of the co-employee.

In the Herbert case, *supra*, the court approved the decision in *Beeson v. Green Mountain Gold Mining Co.*, 57 Cal. 20, as being in harmony with its own views, where the injury ensued from the defective pipe put in by a tinner, which defective pipe caused a fire and death of plaintiff's intestate, holding that for such a pipe the master was responsible, but the decision expressly states that "it did not appear that the deceased knew, or had reason to know, of the defect." In *Washington, etc., R. R. Co. v. McDade*, 135 U. S. 554, it is held that employers "are bound to use all reasonable care and prudence for the safety of those in their service by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery, which was, or ought to have been, known to him and was unknown to the employee or servant. But if the employee knew the defect in the machinery from which the injury happened and yet remained in the service without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use and is entitled to no recovery." In *Kane v. Northern, etc., R'y*, 128 U. S. 91, Harlan, J., says: "It is undoubtedly the law that an employee is guilty of contributory negligence, which will defeat his right of recovery for injuries sustained in the course of his employment, when such injuries substantially resulted from dangers so obvious and threatening that a reasonable, prudent man, under similar circumstances would have avoided

them if in his power to do so." The horns of a dilemma seem here presented to plaintiff. If standing gas in this mine was an obvious danger, the deceased was guilty of contributory negligence; if it was not in fact an obvious danger, it was only because deceased relied upon observance by his co-employees of the rule forbidding entrance into a room where a danger signal was posted. There is nothing to indicate in any way that there was any danger from this standing gas, if it were not ignited by going into its presence with a naked light, and if this were provided against in a way known to deceased, the existence of standing gas can not, we think, be considered as making his place unsafe, or, if unsafe, only in such a way as he assented to. In *Hough v. Railway Co.*, 100 U. S. 224, it is said that "if the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death." It would be strange if it could be argued that though an action by the engineer could not be maintained under such circumstances, yet the fireman, having similar knowledge and continuing without complaint to ride on the engine used by the engineer, could recover. In *Dist. Columbia v. McEligott*, 117 U. S. 621, it was held in effect, that if the jury deemed it reckless carelessness in a laborer to work near a dangerous bank for any length of time, however brief, then he could not recover, though injured while waiting the fulfillment of the master's promise to send assistance so as to guard him against apprehended injury.

There is no lack of recognition by us of the well established doctrine, that where there is combined negligence of an employer and fellow servant the master is liable for injury inflicted in the course of employment, but the cases we have referred to show, even if we concede failure of duty in this case on the part of the mine owner, that if such failure is known

and acquiesced in without complaint, and is the efficient proximate cause of injury, the servant is precluded from recovery. All these cases we have cited are in entire accord with *Cumming v. Grand Trunk R'y Co.*, 106 U. S. 700, which states the general principle of liability of the master where he contributes to the injury, as this case speaks in no way of knowledge of defects or failure of duty of employer had by the injured servant; and, as far as our investigation has gone, none of the cases following this principle deny the effect of knowledge by the employee killed or injured.

If Flick and Kelly were fellow servants of deceased, and it was by their act or negligence, in disobedience of the imperative command given by the danger signal, that death ensued, it seems clear no recovery can be had upon the theory of explosion originating in room 8. In this we have assumed, that deceased agreed to work in the White Ash Mine with rooms containing dangerous gas, merely guarded by a fire mark or danger signal. At least, there was evidence altogether sufficient for the court to have explicitly instructed the jury on this question and it wholly omitted to do so; but we will discuss the court's instructions further on.

While there are many decisions from which it might be strongly argued that the standing gas in room 8 could not be considered the proximate cause of the death of the plaintiff's intestate, because the act of Flick and Kelly was an intervening act of such character as to break the chain of causation, and because it was not probable or reasonable to expect, with the safeguards employed to prevent entrance into a room where there was standing gas, that an explosion and consequent death would occur, yet upon the principle rigidly stated in the *Cumming* case, *supra*, it seems to the writer at least, that these decisions, among which are those of *Shaeffer v. Railway Co.*, 105 U. S. 249, and *R. R. Co. v. Kellogg*, 94 U. S. 469, and the argument upon which they proceed, do not apply. It is preferred, therefore, to place our conclusion upon the ground that the master in this case is not shown to be guilty of negligence of which plaintiff's intestate can com-

plain, as he accepted or at least there is evidence tending to show that he accepted, employment with an implied waiver as to there being standing gas in places in said mine, provided they were guarded by a danger signal. If injury resulted from a fellow servant's act or negligence under such circumstances, such injury must be considered to have arisen from the risk incident to the employment.

That Flick and Kelly were fellow servants of the deceased, they being "company men" employed in assisting in the getting out of coal without actually drilling holes or doing any blasting with powder, as deceased was engaged in doing, we hold to be clear, and without discussing the question so much gone over, we again cite the Baugh case, *supra*, and also that of the N. P. R. R. Co. v. Charless, 162 U. S. 359. We will close the discussion on this branch of the case by quoting from the case of Bern v. Gaston Coal Co., 27 W. Va. 285, as follows: "If therefore it appears that the proprietors of the mine had been negligent in permitting fire damp to accumulate in their mine, which would not produce any injury until ignited, and if it were ignited by a fellow servant who went into the dangerous part of the mine with a lighted lamp contrary to the orders of the proprietors of the mine, and by such lighted lamp the fire damp was ignited and exploded by which the servants were injured, such explosion and injury would be directly and immediately caused by the act of the fellow servant and not by the negligence of the master, and the master would not be responsible for such injury."

The other theory advanced as to the explosion is, that it was not simply a gas explosion but was a gas and powder explosion, originating in one of the rooms in the fourth left entry where work in getting out coal was going on, these rooms running from 12 to 18 inclusive, and that it was caused by what is known as a "gunning or windy shot." This kind of shot was described as being caused by an insufficiency of powder to break the coal or from insufficient or careless tamping. In either event there would issue from the hole drilled into the coal a sheet of flame, extending in some instances a

distance of 60 or 70 feet. This flame it was testified, would ignite dust, impregnating the air and cause explosion where the gas only amounted to one and a half to two per cent, so small as not to explode in the presence of naked lights carried on the caps of the miners. These gunning or windy shots are shown to "occur occasionally but are not a regular occurrence." This theory was sought to be maintained by the defense. In the brief of its counsel it is urged that a windy or gunning shot is evidence of negligence by fellow servants, and that if an explosion so occurred the defendant should be held exempt from liability. In the first place it is not at all clearly shown that such a shot is evidence of negligence, and even if it were, we do not think that under the Cumming case, supra, such would necessarily excuse the defendant from liability.

These shots were not so rare as to be improbable, and there was testimony pro and con as to the quality of the air. If the jury believe from a preponderance of the evidence that the air was bad and made so by partial obstruction of the air course and that such obstruction was negligence of the defendant which resulted in the accumulation of gas of sufficiently large percentage to be exploded by a gunning shot, and they further believed that defendant should have reasonably anticipated such accumulation from this cause, the fact that gunning shots evidenced contributory negligence by fellow servants would not prevent the returning of a verdict against the defendant. It appears in evidence that the presence of this gas is not perceptible to the senses, and that it is insidious and not an obvious danger. The jury might believe, under proper instructions, that deceased would not be guilty of contributory negligence in continuing at work until an explosion resulted from a gunning shot, or that the mere presence of bad air, if there was bad air, was a sufficient warning to him to retire to safety, as it is in testimony, that frequently the air would be better and worse in the mine.

If however the jury should believe that defendant caused to circulate through the mine the statutory quantity of air and

that an explosion nevertheless occurred, whether from a gunning shot or by ignition from naked lights, because of an accumulation of gas casually occurring, then defendant should not be held liable, as to hold otherwise would be to make defendant a guarantor of safety in the working places, when instead an explosion from an accumulation of gas so casually occurring is to be considered a risk incident to the employment in which deceased was engaged.

We are unable to say upon which theory the jury found defendant liable in this case, but the court was in error in not clearly drawing to their attention the law applicable to each theory.

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These instructions were error also in other respects. Their general import as to everything relating to the duty of the defendant was not that reasonable diligence and care should be exercised by defendant in an endeavor to perform its duty, but that the duty must be performed or it be deemed guilty of "culpable negligence." We so understand instruction 7 and if it was intended to lessen its severity by No. 8, the language is not explicit enough to effectuate that intention. Thus in No. 7 the court instructs that it was incumbent on defendant to employ fit, suitable, competent and experienced men to operate and manage the mine; while in the Baugh case, supra, we find the following language: "If the master has taken all reasonable precautions to inquire into the competency of one proposing to enter his service, and as a result of such reasonable inquiry is satisfied that the employee is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty; and this notwithstanding that after the servant has been employed it shall be disclosed that he was incompetent and unfit? No human inquiry, no possible precaution, is sufficient to absolutely determine whether a party under certain exigencies will or will not do a negligent act. * * * Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow servant does

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not in itself prove any omission of care on the part of the master in his employment."

The portion of the instructions of the learned judge, that it was incumbent on defendant to employ and use proper, necessary and suitable machinery and appliances for forcing a sufficient and necessary quantity of pure air into the said

INSTRUCTIONS. White Ash Mine, etc., etc., should not have been given, as no attack whatever was made upon the system or plan of ventilation, and this was calculated to mislead the jury and draw their minds away from the questions at issue.

The instruction that it was "incumbent on the defendant to keep open all air courses, slopes, cross-cuts, entries and cross-entries in said mine for the proper, necessary,

INSTRUCTIONS. free and unmolested circulation of the air in said mine while the men were working therein, and to provide an adequate amount of pure air for the safe and proper ventilation of said mine for the protection, safety, comfort and convenience of the men so working in said mine at the time and immediately prior to the time of the alleged explosion, and at the time of the death of plaintiff's intestate" is also objected to. This is faulty in that it strongly implies that the defendant guaranteed all these things. It is conceded that it is the positive duty of the master to make the place of work reasonably safe, but again quoting from the Baugh case we find that this "positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety." The including also of all the things mentioned in the instructions, such as keeping open all air courses, slopes, cross-cuts, entries and cross-entries," and providing for "comfort" and "convenience," etc., has the effect of carrying into the case questions tending to confuse the jury and to make them hunt about for faults committed by the defendant having no bearing upon or connection with the questions involved at the trial. All this may have been done upon the theory that the act of congress, embodied in the instructions required such strict performance by the defendant

as to make nonperformance not merely evidence of negligence, but negligence per se. In the first place, if it might even be held that this showed negligence per se, there was no evidence going to show that any slope, cross-cut, entry or cross-entry was not open, or that the comfort or convenience of any miner was impaired, but there was evidence to show one air course partially obstructed. To the ignition theory in room 8 this part of the instructions could have no reference under the view we have taken of this case.

The act of congress, passed March 3, 1891, provides, that managers or owners of coal mines shall provide adequate ventilation of not less than so many cubic feet of air per minute for so many men and by proper appliances force same through the mine to the face of each working place so as to dilute and render harmless noxious and poisonous gases and to keep all working places clear of standing gas. It has been laid down in a recent work of high authority, that a breach of statutory duty is negligence per se. 3 Elliott, Ev., sec. 1155. Such, however, does not seem to be the view of the United States supreme court. That court speaking by Mr. Justice Lamar, in the case of *Grand Trunk, etc., v. Ives*, 144 U. S. 408, where the question related to the violation of an ordinance prohibiting the running of trains greater than the named speed, after noticing the conflict in authority on such questions, says: "Perhaps the better or more generally accepted rule is, that such an act on the part of the railroad company is always to be considered by the jury as a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence." Breaches of statute or ordinance were similarly treated in the cases of *Randall v. Baltimore, etc., Railroad Co.*, 109 U. S. 485; *Hay v. Michigan Central, etc.*, 111 U. S. 228, and *U. P. R. R. Co. v. McDonnell*, 152 U. S. 282. Where the means to be adopted for securing requisite ventilation were not prescribed, but congress contented itself with general directions, it should be held that reasonable effort is to be exerted to attain and maintain this

result. If this result were neither attained nor maintained it would then be the jury's province to say whether under all the circumstances this failure was or not due to negligence by the defendant.

Instruction 9 should not have been given, as it is not considered that such an instruction had any possible application to this case, except as to violation by Flick and Kelly of the rule against entering places marked with danger signals, and we have already indicated what the court should have done in that regard. All the instructions must be changed from 7 down to 14, inclusive, on the lines we have indicated, as it is unnecessary to further specially advert to them.

It is our view, that upon the record as it comes before us, the court should have clearly and in a distinguishing way submitted to the jury the theories of explosion originating in room 8, and of its originating elsewhere in the fourth left entry of the mine. The instructions should have told the jury, in effect, as to the explosion originating in room 8 that if they believed it there originated, and that deceased consented to work in said mine with places dangerous because of standing gas, guarded by danger signals, and knew, or had good reasons to know, that the business of the mine was conducted in this way, and should further believe that the standing gas was exploded in such room by the miners Flick and Kelly or either of them; then such explosion was by act or negligence of the fellow servants of the deceased, and for plaintiff to recover it must be shown to the jury by a preponderance of the evidence that the said room was not danger marked by defendant at the time Flick and Kelly entered the same with naked lights. The court should have submitted the other theory, upon the proposition of defendant negligently or not permitting gas to be generated and remain in and around the working places in the mine, upon the lines we have laid down.

The court should have further instructed the jury that, if it were not shown by a preponderance of the evidence where or in what way the explosion originated, one of the ways

exempting from liability and the other not, a verdict should be returned for defendant.

We do not intend by this opinion to prescribe any form of instructions, but rather to indicate the general line upon which they should proceed.

Only one other question is it deemed necessary for this opinion to refer to, and that is upon the measure of damages. The personal representative of the deceased is merely the nominal or statutory plaintiff in this action. Thus it appears that she will be a distributee along with her five children, of whatever may be finally recovered in this action, while as to the two cases consolidated with this upon the trial she has no pecuniary interest in the result. Yet as administratrix of her husband and each of her two sons, all killed at the same time in said fourth left entry, she is the plaintiff in each case. It is plain that the court should not have instructed that a nominal plaintiff could recover for loss of comforts and protection. It may be that this language is merely inaccurate and does no harm, if the rule of damages is otherwise correctly stated.

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damages.

The rule in statutory actions for injuries causing death is, as shown by abundance of authority, that the damages recoverable is compensation for the pecuniary loss to the parties entitled to recovery. Chicago v. Norris, 26 Ill. 400; Conant v. Griffin, 48 Ill. 412; Railroad Co. v. Butler, 57 Pa. St. 338; Telfer v. R. R. Co., 30 N. J. L. 199; Brady v. Chicago, 4 Biss. 451; R. R. Co. v. Polk, 24 Ga. 366; Moffatt v. Tenney, 30 Pac. Rep. 348.

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damages.

It can not be readily seen how, arguing from the relations and obligations of one human being toward another, the life of any one can be of pecuniary value to another, except it be the life of a husband and father to his wife and children to whom he owes support and education. It must be considered, however, that as our statute gives a right of recovery to any one who is of kin in the same way that it gives it to the wife and children of deceased, merely prescribing who are prior distrib-

utees of what is recovered, the rules for estimating the loss in each case should be the same. Such a rule must be that from the proof as to age, earning capacity, health, habits and probable duration of life, the jury shall say what is the present worth of the life of deceased, with nothing to be added by way of consolation to the parties or party entitled as distributees to the proceeds of recovery, and nothing for suffering or anguish of mind or body by the deceased. It is resolved into a cold question of dollars, with sentiment in no way to be taken into account. Neither does the question of mitigating or aggravating circumstances have any weight so far as the damages denominated by our statute "compensatory" are concerned. If there should be a recovery full compensation should be awarded, mitigating or aggravating circumstances having effect only on the question of allowing or not allowing exemplary damages in addition to full compensation.

Our statute appears to mean, that if there are "aggravating circumstances attending the wrongful act, neglect or default" for which the defendant is responsible, then exemplary damages should be added to those which are merely compensatory. In the case of *Lake Shore, etc., R'y Co. v. Prentice*, 147 U. S. 101, Mr. Justice Gray goes into a very elaborate discussion of exemplary damages as relating to the liability of a corporation therefor, and from it we will deduce our conclusions, that being a court whose decisions should be held controlling with this court. The portion of that decision most applicable to this case is the affirmance of the case of *M. & St. P. R'y v. Arms*, 91 U. S. 495, in which an instruction that if the jury "find that the accident was caused by gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages" was held error. The court said, that whether that was called gross or ordinary negligence the jury could not give damages beyond the limit of compensation. "To give exemplary damages there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences." The words of our statute do not, we think,

change the rule thus announced, but circumstances of aggravation to bind the principal for the act of the agent must be as above stated, or where the principal participated in a bad intent. The decision in the D. & R. G. R. R. v. Harris, 122 U. S. 610, was approved in holding the corporation liable for exemplary damages but this was because the corporation, by its governing officers, participated in and directed all that was done, the thing done being in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by another company. There bad intent by the corporation was proven. There is nothing in this record that tends in the least to show bad intent on the part of the defendant, nor is there anything to show that a servant knowingly unfit was employed or retained, whose unfitness would, or did, expose its employees to danger, or anything from which an argument might have been advanced that defendant was so careless of the lives of his employees that a presumption of conscious indifference as to consequences arose, unless the obstruction of the fourth left air course may be thought to show it. The defendant is shown to have resorted, as usual, to its inspections, and the air in the mine was never bad enough to be a warning to the employees to desist from working, even if we disregard all testimony that it was not bad at all. We scarcely think there was sufficient basis for any instruction as to exemplary damages, but if there should be produced sufficient evidence on a retrial, the court should inform the jury that exemplary damages may be added to compensatory damages, if it is shown by a preponderance of evidence that the defendant exhibited such entire want of care as showed a conscious indifference to consequences. Mere neglect of a fellow servant, however gross, would not authorize exemplary damages, unless defendant, knowing his unfitness, employed or retained him, or in some way ratified his act. If there is evidence on a retrial on this subject an instruction as to exemplary damages should be given. At all events, the jury should be explicitly informed of the nature of exemplary damages, and their attention confined to a consideration of what in

the evidence, in the way of aggravating circumstances, may warrant their being given.

Wherefore it is considered that the refusal of the lower court to award a new trial was error, and a new trial should be granted; this case to be remanded, with directions to the lower court to grant the same.

Smith, C. J., Hamilton and Bantz, JJ., concurring.

[No. 705. August 6, 1897.]

RATON WATERWORKS COMPANY, Appellee, v.
TOWN OF RATON, Appellant.

MUNICIPAL CORPORATIONS—CONTRACT—SPECIAL TAX LEVY—STATUTORY CONSTRUCTION.—Held: That paragraph 71, section 1622, Comp. Laws, 1884, providing that the special tax therein authorized for the payment of water rents, shall not exceed the sum of two mills on the dollar for any one year, is a limitation on the sum to be paid therefor by special tax, and an inhibition on the trustees of the town of Raton from paying any more than the sum derived from a two-mill levy on the dollar upon the property subject to taxation within its corporate limits.

ID.—STATUTORY CONSTRUCTION.—Nor is the effect of paragraph 71, supra, changed by paragraphs 2, 3, 6, section 1622, Comp. Laws 1884, authorizing and directing the town of Raton and all similar municipal corporations to assess and levy taxes for general and special purposes, and when collected to be applied “only” to the purposes in the ordinance “No. 10” specified.

ID.—STATUTES—NOTICE—ESTOPPEL.—The statutes are a public notice of their contents, and a complainant contracting presumably with a knowledge that defendant was limited, by the statute creating it, to a two-mill levy for the discharge of its obligation, will not be heard to complain that the trustees of defendant refused to transcend that power.

ID.—STATUTORY CONSTRUCTION.—The power to make the contract in question, and to execute the proprietary grant and business portion of a quasi public nature, did not carry with it the power to depart from the mode prescribed by the statute for raising revenues with which to pay for the supply of water so contracted to be furnished.

Id.—CONTRACT—SPECIFIC PERFORMANCE—JURISDICTION.—While a court of equity, in an action against a town for the specific performance of a contract for the payment of water rents, may declare the validity of the contract, it has no jurisdiction to compel the town to make a levy, the remedy in such case being by mandamus.

Id.—CONTRACT—CONSTRUCTION.—The contract of a town to pay more than it has the power to collect by taxation is not void, but obligates the town to exhaust its power, if necessary, to collect a tax sufficient within the statutory limitation of levy of two mills upon the entire taxable property within its jurisdiction.

Appeal, from a decree for complainant, from the Fourth Judicial District Court, Colfax County. Reversed.

The facts are stated in the opinion of the court.

J. H. CRIST and W. H. POPE of counsel for appellant.

The power of the court to hold a contract of the character of the contract in question, void as to any excess over the limit fixed by law seems recognized by a number of authorities. *Dunn v. Great Falls*, 31 Pac. Rep. 1017; *Culbertson v. Fulton*, 127 Ill. 30; *Comp. Laws*, 1884, sec. 1622, par. 67-71. See, also, *United States v. Macon County*, 99 U. S. 582; *Quincy v. U. S.*, 113 Id. 332; *Webster v. People*, 98 Ill. 343; *State v. Babcock*, 20 Neb. 522; *Parker v. New Orleans*, 38 Fed. Rep. 782; *Findley v. Hall*, 43 Pac. Rep. 28; *Bank v. Lansing*, 25 Mich. 207.

It is insisted that complainant has invested a large sum of money in its plant, which fact is urged as a reason why a court should hesitate to declare the contract invalid, even in part. On this point, see: *Waite, C. J.*, in *U.-S. v. Macon Co.*, *supra*; *Risley v. Howell*, 57 Fed. Rep. 544; *Insurance Co. v. Oswego*, 55 Id. 361; *Brenham v. Bank*, 144 U. S. 188; *Doon Township v. Cummings*, 142 Id. 566; *Law v. People*, 87 Ill. 385; *Durango v. Pennington*, 8 Colo. 257; *Sullivan v. Leadville*, 11 Id. 483; *State v. Murphy*, 31 S. W. Rep. (Mo.) 784; *Bank v. Stillwater*, 45 Fed. Rep. 544; *Price v. Quincy*, 188 Ill. 443. See, also, *Guthrie v. Bank*, 58 Pac. Rep. 4; *Law v. People*, 87 Ill. 385; *People v. May*, 10 Pac. Rep. 652;

Buchanan v. Litchfield, 102 U. S. 278; Litchfield v. Ballou 144 Id. 193; Dillon on Mun. Corp., sec. 461; Richardson v. Grant Co., 27 Fed. Rep. 495; Bank v. Willow, 44 N. W. Rep. 1001; McElhenny v. Superior, 49 Id. 705; McBrien v. Grand Rapids, 22 Id. 205; Chicago v. Shober, etc., 6 Ill. App. 560.

WARREN, FERGUSON & GILLET and A. C. VOORHEES and W. C. WRIGLEY for appellee.

The questions of law presented on this appeal resolve themselves into but one, as stated by appellant, viz.: "Is the contract between the parties hereto, providing for a semi-annual payment of \$1,962.50, as water rent, void?"

An examination will show that the question here presented is not decided in any of the cases relied upon by appellant. On the other hand, the controlling authorities are explicit to the effect that the town was authorized to levy and collect taxes for general and special purposes, and to appropriate money for general corporate purposes, etc. Comp. Laws, 1884, sec. 1622, pars. 2, 3, 6; Grant v. Davenport, 36 Iowa, 396; Des Moines v. Water Co., 64 N. W. Rep. (Iowa) 269, 279; Coy v. City Council, 17 Iowa, 1; Coffin v. City Council, 26 Id. 515; Drasly v. Cedar Falls, 27 Id. 233; Water Co. v. Woodward, 49 Id. 58; Water Works v. Creston, Dist. Ct. Union Co., Iowa, Jan. Term, 1896; 15 Am. and Eng. Ency. of Law, 1115; 29 Id. 11; 1 Dill. on Mun. Corp. 161; Valparaiso v. Gardner, 97 Ind. 1; East St. Louis v. E. St. L. G. L. & C. Co., 98 Ill. 415; 37 Am. Rep. 97; Smith v. Dedham, 144 Mass. 177; Water Co. v. Utica, 31 Hun. (N. Y.) 431.

In regard to ordinance No. 65, requiring all town warrants issued after June 1, 1895, to be received in payment of all town licenses, it seems superfluous to argue that the preference sought to be given to such warrants is in direct violation of the statute. Comp. Laws, secs. 1649, 1650; Fazende v. Houston, 34 Fed. Rep. 95.

LAUGHLIN, J.—The complainant corporation, the Raton Waterworks Company, filed its bill of complaint in the

court below against the defendant corporation, the town of Raton, and among the allegations it alleged that it entered into a certain contract with the said defendant corporation, by which it agreed and bound itself, its successors and assigns, to supply the said defendant corporation with water for a period of twenty-five years from the twenty-fourth day of July, 1891. This contract was an exclusive grant to complainant corporation by the defendant corporation, and was in the nature of an ordinance adopted and approved by the board of trustees of said defendant corporation, and was and is known in the record in the cause as "Ordinance No. 10;" and such parts thereof as seem material to the decision of the cause are as follows, to wit:

"Sec. 4. Said Raton Waterworks Company, its successors and assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees; provided, persons owning property along the line of such proposed extensions shall take a reasonable amount of water; and provided also, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered."

"Sec. 9. The said town hereby exempts from all taxes for a term of twenty-five years from and after the date specified in section 1, July 15th, 1891, the property of said waterworks company of every name, nature and description which may be used by it in the conduct of its business. . * * *

"Sec. 10. In consideration of the benefits that will accrue to the town of Raton and its people by the erection and operation of waterworks, and for the better protection of the town against fires, the town of Raton does hereby agree and bind the said town to rent from the said Raton Waterworks Company, or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires and purposes pertaining to the fire department, flushing sewers and irrigating public school grounds and parks,

and the said town, by the said board of trustees, hereby agrees and binds the said town to pay to the said Raton Waterworks Company, or its assigns, at the rate of one hundred dollars per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Waterworks Company, or its assigns, the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; provided, the said Raton Waterworks Company, or its assigns, shall erect and maintain at all times in good repair double-discharge fire hydrants with four-inch connections to the main pipe, and two and one-half inch hose connections with each hydrant.

“Sec. 11. The said town of Raton shall pay to the said Raton Waterworks Company, or its assigns, as follows, to wit: On the first day of January and July of each and every year one-half of the aforesaid money, and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent per annum.”

“Sec. 15. Within thirty days after granting of this franchise the said Raton Waterworks Company shall file with the town recorder of said town its acceptance in writing of all the terms, provisions and conditions of this ordinance, which acceptance, before filing, shall be duly acknowledged before some officer authorized to take acknowledgments, and the same shall be recorded in the book of ordinances of said town, and safely kept by the said town recorder; provided, the same shall be ratified by a vote of the people of this town as is hereinafter provided.

"Sec. 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose house on the first day of August, A. D. 1891. * * *"

The foregoing ordinance was ratified by the qualified electors of the defendant corporation as therein provided. And the contract was duly accepted by the complainant corporation, as therein provided.

It appears in the record from the said bill of complaint that at the request of the board of trustees of defendant corporation complainant put in forty-four hydrants, in the manner specified, the semi-annual rentals of which amounted to \$1,962.50. It further appears that defendant corporation paid at that rate, semi-annually, to complainant corporation its water rents in money, and by its warrants duly issued for any balance due and for accrued interest, in accordance with said contract and ordinance number 10, up to the year 1895; that on May 23, 1895, the defendant corporation enacted ordinance number 64, under which it declined to pay more than the revenues derived from a two-mills levy on the dollar each year on taxable property within said defendant corporation. Complainant prays for a specific performance of the contract under ordinance number 10, and for an order perpetually restraining defendant corporation from enforcing ordinance number 64.

The defendant corporation, in its answer, admits that complainant corporation complied with its part of the contract, as stated in said ordinance number 64. But "defendant denies that said ordinance number 10 became and was and now is valid and operative, and in full force and effect, and obligatory upon both of the parties to this cause." Also "defendant denies that under said ordinance and contract it became and was and now is the duty of defendant to pay complainant as rental for the said hydrants the sum of \$1,962.50 on the first day of January and July of each year after the making of the said contract or ordinance. Defendant denies that said sum of \$1,962.50 is the just sum due under the said contract, and it further and specifically denies that it was and is defendant's

duty under said contract or ordinance to levy and collect a tax sufficient to meet said alleged semi-annual obligations of \$1,962.50." And "defendant denies, however, that said ordinance was enacted wrongfully and without authority of law, and, on the contrary, insists that the same is valid, and in full force and effect. Defendant further denies that said ordinance numbered 64 was and is invalid, illegal and void by reason of being in conflict with the terms of said ordinance numbered 59, or any other ordinance." And "defendant denies that it has at any time or place refused to perform its duty under the contract and ordinance referred to in complainant's bill, but, on the contrary, shows that it has performed, and will perform, its obligations toward complainant under said ordinance, so far as the same is binding, valid and of force and effect. Defendant admits that it has given out that said contract, so far as it calls for the payment of \$1,962.50 semi-annually, is inoperative and invalid, and further admits that it has refused to pay said sum of \$1,962.50 semi-annually; and for cause of such refusal, defendant, further answering, shows to your honor as follows: That defendant is a municipal corporation, organized under the laws of the territory of New Mexico, as contained in sections 1608 et seq., as amended, of the Compiled Laws of said territory. And as such municipal corporation it granted to complainant, a private incorporated company, the right to build, maintain and operate waterworks as hereinafter admitted; and as hereinbefore set forth defendant contracted with complainant to furnish water as is fully set forth in said ordinance numbered 10. Defendant further shows that under the law it is authorized, empowered and required to levy each year, and cause to be collected, a special tax sufficient to pay off the water rents agreed to be paid to complainant; provided, the said special tax shall not exceed the sum of two mills on the dollar for any one year. Defendant shows that, as practically its entire revenue is derived from its tax levy, it is thus limited in its payments for water rents to the proceeds of a two-mills tax levy on each dollar of taxable

property. Defendant further shows that for the year 1891 the total assessment for town purposes, as certified by the county assessor, was \$628,940; that the town tax rate for said year was five mills on the dollar, making a total possible tax yield \$3,119.70, and giving an actual tax yield of \$2,089.52. For the year 1892 the total assessment was \$673,900, the tax rate eight mills on the dollar, and the actual amount of taxes collected \$3,204.39. For the year 1893, the total assessment was \$807,230, the tax rate was six mills, and the taxes actually collected amounted to \$2,718.83. For the year 1894 the total assessment was \$650,620, the tax rate was ten mills on each dollar of taxable property, and the amount of taxes actually collected was \$3,616.52. Defendant shows that under the law it paid complainant each year the full proceeds of the two mills tax levy authorized by law for water rents; that in 1892 it paid complainant the sum of \$1,925, in 1893 the sum of \$1,800, in 1894 the sum of \$1,600, and for 1895 it has, under ordinance numbered 64, levied said special tax of two mills on each dollar of taxable property to meet complainant's water rent. Defendant shows that under the law the total amount appropriated for any purpose for any fiscal year can not exceed the probable amount of revenue for that year, and that its appropriation of \$1,500 in said ordinance numbered 64, for complainant's benefit for the year 1895, is a full compliance with complainant's legal demand under said contract ordinance numbered 10, as likewise amounts paid for 1892, 1893 and 1894 are in full of all that complainant can in equity and good conscience demand under its contract with defendant. Your defendant, further answering, shows that said alleged semi-annual rental of \$1,962.50, claimed by complainant, is far in the excess of the amount derivable from a two-mills tax levy on the assessed value of the property subject to taxation within said town of Raton, and that said rental, so far as it is in excess of the proceeds of such a tax levy, is illegal, inoperative, and void. Defendant further shows that said ordinance numbered 10, so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the pro-

ceeds of a two-mills tax levy, or to impose a tax levy greater than said rate, was and is null, void and inoperative, the same having been made and entered into by defendant's trustees in violation of law, and in excess of the powers conferred upon them by the statutes of New Mexico. Defendant further shows that said warrants issued to complainant, as set forth in complainant's bill, were and are null and void, having been issued by defendant's trustees in excess of the amount derived from a two-mills levy on each dollar of taxable property, and having thus been issued contrary to law, and in excess of the authority conferred upon said trustees by law. Defendant further shows that for the reasons just mentioned ordinance numbered 59 was and is void and inoperative, and that ordinance numbered 64 was and is valid, and in full force."

Such parts of ordinance numbered 59 as appear pertinent are as follows, to wit:

"Section 1. That the general tax levy for the town taxes for the fiscal year commencing on the 1st day of April, 1895, shall be and is hereby declared to be ten mills for and upon every one dollar (1.00) of assessable property, both personal and real, within the corporate limits of the town of Raton, the same to be assessed and collected according to law.

"Sec. 2. There is hereby appropriated out of money and revenues covered into the town treasury, or to be collected and paid into the same, from any and all sources, during the fiscal year commencing on the 1st day of April, 1895, whether the same be derived from taxes, licenses, fines, fees or any other source whatsoever, for the following purposes and objects, the following sums and amounts, to wit: To pay all outstanding indebtedness of the town the following amounts: Amount due the Raton Waterworks Company up to January the 1st, 1895, \$4,735.15."

The sum of \$4,735.15, referred to, it appears, was a deficit claimed by complainant to be due from the defendant up to that date.

The bill of complaint was sworn to, but an answer under oath was expressly waived, and it was not under oath, and no

replication filed by the complainant to the bill of complaint. There were no proofs taken on either side, and the cause was heard on bill and answer. After final decree was entered, defendant assigned errors as follows: "First. That the court below erred in holding that ordinance No. 10, of the town of Raton, granting franchise to the Raton Waterworks Company to erect and maintain waterworks, published May 24, 1891, and alleged to have been duly ratified and confirmed at an election held in the said town of Raton on the 1st day of August, 1891, became and was and now is valid and operative, and in full force and effect, and in all respects obligatory upon the town of Raton. Second. That the court erred in finding all the material allegations in the said bill of complaint to be true as therein stated. Third. That the court erred in decreeing a specific performance of said ordinance numbered 10 by and on the part of the town of Raton. Fourth. That the court erred in decreeing that the town of Raton is by reason of said ordinance numbered 10 indebted to the said Raton Waterworks Company in the sums mentioned in the said decree, or in any amount whatsoever, and in decreeing that said town of Raton issue to the said Raton Waterworks Company its warrants in payment and satisfaction of the amounts thus found to be due under said ordinance numbered 10."

The enactment of ordinance numbered 10 by the trustees of the defendant town, a submission and approval of the same by a majority of the electors thereof, and the acceptance of the propositions therein by the complainant corporation are admitted by the answer, and this constituted the contract over the terms, conditions and construction of which this controversy arose, and of which we are required to determine. It is alleged in the bill of complaint, and admitted by the answer, that the water plant of the complainant was constructed in compliance with the requirements of the contract, and that the defendant town is and has been using and reaping the benefits of its part of the results of the contract. It is also alleged and admitted that complainant put in forty-four hydrants in the manner prescribed in the contract, and that by the terms

of the contract defendant town, by its board of trustees, agreed and obligated itself to pay for twenty-five of said hydrants \$2,500 per annum, and for the other nineteen the sum of \$75 per annum, for twenty-five years; and that the defendant town agreed to pay as such water rentals the sum of \$1,962.50 semi-annually on the first day of January and July of each year thereafter for the period of said twenty-five years. The defendant town avers that the contract so made is void pro tanto, if not void in toto, because it avers that it (the defendant town) is limited by statute to an assessment and levy of not to exceed two mills on the dollar of its taxable property to pay such water rents each year, and no more; and that the sum derived from a two-mills levy each year is not sufficient to pay the sum of \$1,962.50 semi-annually, each year, as provided in said ordinance and contract; and that the trustees of the defendant town had no authority to bind it by the passage of said ordinance numbered 10, and the making of the contract thereunder; and that such action was ultra vires, and void pro tanto. The reply to this by the complainant corporation is that, while the proceeds derived from the two-mills levy is insufficient to pay the said sum of \$3,925 per annum, yet the defendant town has the authority, under the statute, and that it is bound, under the terms of the said ordinance and contract, to pay any deficiency which may arise over and beyond the two-mills levy out of the taxes collected for general current expenses; and the trustees of the defendant town had full authority to enact ordinance numbered 10, and to make the contract thereunder, after the same has been submitted to and voted for by a majority of the qualified electors of said defendant town corporation, and that the defendant town is bound thereby.

This brings us up to the issue in the cause, as stated in complainant's brief. Is the contract between the parties hereto, providing for a semi-annual payment of \$1,962.50 as water rent, void? A court should labor to sustain the validity of a contract entered into in good faith, and where no fraud appears, and where a consideration has passed from the one,

and been received by the other, so long as there is any apparent authority existing at the time in the parties thereto for the making of the same; and the burden rests upon those who attack its validity to make it appear that it is voidable, void pro tanto, or void ab initio. On the other hand, a court should not hesitate to declare a contract void when it is made to appear for any reason that it should be done; and this rule should apply, and does apply, as to all classes of contracts, whether between corporations and individuals or between individuals. It appears that both the complainant waterworks company and the defendant town of Raton were duly and legally incorporated under the laws of this territory, and that said defendant town corporation was organized and exists under and by virtue of the general incorporation laws of the territory, from section 1608 to and including section 1724 of the Compiled Laws of 1884, and the amendments thereto, relating to incorporated cities and towns; and the authority for making the contract in question is found in that statute, and the part applicable thereto is as follows, to wit: "Sec. 1622, par. 71. And if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works; provided, however, that said last mentioned tax shall not exceed the sum of two mills on the dollar for any one year." It is shown in defendant's answer, and it is not denied by any replication or proofs by complainant, that it has paid complainant the proceeds of a two-mills levy and more each year on all the taxable property within defendant's corporate limits, since the contract was entered into. It further appears in the answer that the total assessed valuation of the property subject to taxation, within the corporate limits of said defendant town in the year 1891, and at the time the

contract was entered into, was \$628,940, and that the total tax yield for that year on a five-mills levy was \$2,089.52, being only \$127.02 more than one-half the money to make one semi-annual payment. For the year 1894 the total assessed valuation was \$650,620, the levy was ten mills on each dollar of the assessed valuation—the full limit allowed by law—and the amount of taxes actually collected was \$3,616.52. This was the largest sum collected in any one of the four years, and was insufficient to pay the yearly water rental contracted by defendant to be paid to the complainant, thus consuming all the revenues of defendant town arising from taxation, and creating a deficiency of \$308.48. The total amount of taxes collected for the years 1892, 1893 and 1894 amounted to the sum of \$9,539.74. The total amount due complainant under the contract for this period beginning July 1, 1892, the date the waterworks was accepted by defendant town, was \$9,812.50. Thus it is plainly shown that the entire sum derived from taxes collected as levied on the property subject to taxation within the corporate limits of the defendant town was insufficient to pay the water rents contracted to be paid by it. To meet the deficiencies as they occurred from time to time, the defendant issued its warrants, and it appears from ordinance numbered 59, in the record there, that on March 18, 1895, there was a deficit due complainant of \$4,735.15, after having received from defendant the sum of \$5,325 as water rents, and which it avers was fully two mills on the dollar of its taxable property during that time. And it contends that the warrants issued in payment of said deficiency were so issued by its trustees without authority of law, are in excess of the amount authorized, and are void. It is not shown from what other sources the defendant derives revenues, but it avers that practically all is derived from taxes collected from the levies made on all of its property subject to taxation. It also appears from the record and ordinance numbered 59, which complainant here seeks to have enforced, that on the first day of April, 1895, the then existing indebtedness of the defendant town was about \$7,000; and that the appropriation

for the current expenses for the fiscal year from that time to April 1, 1896, was about \$6,000. The record does not disclose the assessed valuation of the property subject to taxation within the limits of the defendant town for the year 1895, but, assuming that it was about the same as that of the previous year, the tax yield would fall short of the amount required to pay the water rents, even if a ten-mills levy, the full limit allowed by law for all purposes, had been made each year.

It appears that the cause was set down and heard on the bill and answer in pursuance of a stipulation of the parties thereto, but the stipulation does not appear in the record, and the averments in the answer well pleaded are presumed to be true. "If no replication is filed, the matters of defense set up in defendant's answer will, on hearing, be considered as admitted by the plaintiff, although the answer is not under oath." Equity rule 34 of this court; 1 Daniell, Ch. Prac. *p. 846, and note.

We are now brought directly to the first question for determination: Had the trustees of the defendant town corporation the authority to enact ordinance numbered 10, and enter into the contract in question, and thereby bind the defendant town to pay out of the revenues derived from taxation for general purposes any sum in excess of that to be derived

CONTRACT: special
tax levy: statu-
tory construc-
tion.

from a levy of two mills on the dollar on its taxable property for each year? We are of the opinion that the trustees did not have authority and power to so contract and bind defendant town in the manner as provided in said ordinance numbered 10. The statute (Comp. Laws, sec. 1622, par. 71), after the provisions authorizing cities and incorporated towns to construct and operate water and gas works and for the assessment of water and gas rents on the inhabitants using the same, says: "And at the regular time of levying taxes in each year said city or town is hereby empowered to levy and cause to be collected, in addition to other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rent hereby authorized, shall be sufficient

to pay the expenses of running, repairing and operating such works." There is no ambiguity or doubtful meaning about this part of the statute. It clearly means just what it says; that is, that the proceeds from "a special tax" and the proceeds derived from the water rents prescribed by ordinance "shall be sufficient to pay the expenses of running, repairing and operating such works." This applies when a city or incorporated town constructs its own waterworks, and there is no intimation whatever that any other revenues shall be applied to the support and maintenance of the waterworks, and no interpretation can be read into this part of the statute by which the trustees of a town constructing its own waterworks would be authorized to apply any of the revenues levied and collected for the general and current expenses of the town to the support and maintenance of its own waterworks. When the right to construct and maintain such waterworks is granted to individuals or an incorporated company, and shall contract for a water supply for any purpose, "such city or town shall levy each year, and cause to be collected, a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company constructing the works." Again, it is provided that "such city or town shall levy each year, and cause to be collected, a special tax, as provided for above," sufficient to pay off all such water rents agreed to be paid to such company. The phrase, "as provided for above," refers back to the conditions wherein the city or incorporated town constructs the waterworks, and can mean nothing else. Now, what is meant by the words "a special tax" is fully explained in the proviso to this paragraph, as follows: "Provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year." By this proviso the "special tax" is limited to the proceeds derived from a two-mills levy for any one year to pay for water rents provided for in said ordinance numbered 10 and the contract thereunder. This proviso is manifestly a limitation on the sum to be paid for the water rents by the special tax, and an inhibition on the trustees of defendant town from

paying any more than the sum derived from a two-mills levy on the dollar upon the property subject to taxation within its corporate limits. "The office of a proviso, generally," said Mr. Justice Story, in *Minis v. U. S.* 15 Pet. 423, "is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview." Mr. Chief Justice Fuller, in *Austin v. U. S.*, 155 U. S. 417 (15 Sup. Ct. 167), says: "While we concede that the law does not attach a fixed and invariable meaning to a proviso, we think it clear that this proviso negatived the authority granted beyond the limit defined." The limit defined by the proviso now under consideration is the proceeds derived from a levy of two mills on the dollar of the assessed valuation of the taxable property in each year for water rents; that is, the trustees of the defendant town can assess, levy, collect, and apply each year the proceeds arising from two mills on the dollar of all taxable property in payment of the water rents, and no more. This sum, together with the water rents it receives from the consumers of its product, puts the complainant water company on the same and an equal footing with the defendant town had it constructed its own waterworks; and it is not contended, nor is there any reason why, the water company should have any other or more extensive rights granted it than the town corporation would or should have had if it had elected to construct and maintain its own water system.

The general incorporation law, under which the defendant town was incorporated, provides (section 1724, Comp. Laws 1884): "No more than one per centum ad valorem shall ever be levied or collected by any corporation organized under this act upon the assessed value of the taxable property situate within the limits of such corporation for all purposes, and no indebtedness shall be incurred which will require any greater annual expenditure, than one per centum will fully pay off and satisfy." It is apparent from this section that the defendant town corporation as well as all similar municipal

corporations organized under this act, are limited to an assessment and levy of one per centum of each dollar of taxable property within the corporate limits in payment of all the expenses incurred for all purposes; and no indebtedness shall be incurred which will require any greater annual expenditure than the sum so realized shall fully pay off and satisfy. The construction here placed upon paragraph 71 of section 1622 is supported by paragraph 6 of the same section, which provides that cities or incorporated towns may contract an indebtedness by borrowing money or by issuing bonds "for the purpose of the purchase or construction of waterworks for fire and domestic purposes;" but it is further provided in this paragraph as follows: "And no loan for any purpose shall be made, except it be by ordinance, which shall be irrepealable until the indebtedness therein provided for shall be fully paid, specifying the purpose to which the funds to be raised shall be applied, and providing for the levying of a tax not exceeding, in total amount for the entire indebtedness of the city or town (excepting such debts as may be incurred in supplying the city or town with water or waterworks), eight mills upon each dollar valuation of the taxable property within the city or town, sufficient to pay annual interest and extinguish the principal for such debt within the time limited for the debt to run * * * and provided that said tax, when collected, shall only be applied to the purpose in said ordinance specified, until the indebtedness shall be paid and discharged." This paragraph limits the assessment and levy for all purposes, except for water or waterworks, to eight mills on each dollar of the assessed valuation of the taxable property; and paragraph 71, supra, fixes and limits the special tax provided to be collected for water rents at two mills; and section 1724 limits the total levy and collection to ten mills on each dollar of the assessed valuation of the taxable property within the corporate limits of the town. And it seems to us that the trustees of defendant corporation are clearly limited to the payment for water rents to the revenue derived from the two-mills levy each year.

Complainant contends that if the levy of the special tax of two mills was insufficient to pay the water rents, then it was the duty of the defendant's trustees to pay any deficiency out of other revenues available from the funds for other and general purposes. But this position is untenable for the reason: First, because paragraph 6, *supra*, provides "that said tax, when collected, shall only be applied to the purposes in said ordinance specified." This prohibits the trustees from diverting any revenues assessed and collected from the purposes specified in the ordinance for which such levy and collection was made. And, second, because it is shown that the largest sum realized in any one year was \$3,616.52, on a levy of ten mills on the dollar upon all the property subject to taxation within the corporate limits of the defendant town, an amount clearly insufficient to pay the annual water rents of that year of \$3,925; thus leaving nothing for the other current expenses of the town corporation, which, as shown by complainant's own exhibit, ordinance number 59 for 1895, amounted to over \$3,000. And, third, because the trustees of the defendant were prohibited from assessing, levying or collecting more than ten mills on the dollar for all purposes, general and special. The language employed in the statutes hereinbefore extracted from seems to be clear and positive, and that no reasonable doubt can exist as to the construction to be placed upon them. They bristle all over with limitations and provisions on the subject and powers of taxation, and right well they may for the protection of the taxpayers. In *City of Litchfield v. Ballou*, 114 U. S. 190, (5 Sup. Ct. 820),—a cause involving similar principles,—Mr. Justice Miller, speaking for the court, said: "The language of the constitution is that no city, etc., 'shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property.' It shall not become indebted; shall not incur any pecuniary liability. It shall not do this in any manner; neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for

any purpose, no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt in any manner, or for any purpose whatsoever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." In *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 20 Wall. 660, the court said, in referring to general powers and restrictions in the statute: "It is, therefore, to be inferred that when the legislature of the state authorizes a county or city to contract a debt by bond it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself or in some general statute a limitation upon the power of taxation which repels such an inference." As has before been shown, we have special provisos, and a general statute limiting the indebtedness for any and all purposes to ten mills on each dollar on the assessed valuation for each year. *Davenport v. Kleinschmidt* (Mont.), 13 Pac. 249. "The assessed valuation of the city of York was the sum of \$335,000. The vote authorized the issue of, and it is now sought to compel the defendant (city mayor) to certify, bonds to the amount of thirty thousand dollars, bearing interest at the rate of six per centum per annum. The statute limits the levy of tax for waterworks 'to an amount not exceeding five mills on the dollar in any one year on all the property within such city or village as shown and valued upon the assessment rolls.' Comp. Laws 1885, chap. 14, sec. 69, subd. 15. This is a limitation upon the power of the city council beyond which they have no authority to issue bonds." *State v. Babcock*, 20 Neb. 522.

Complainant insists that under paragraphs 2, 3, sec. 1622, *supra*, the defendant had authority, and its duty was, to assess, levy and collect taxes for general and special purposes sufficient to pay all debts it contracted. Among the

COMPILED LAWS,
SEC. 1622,
PARS. 2, 3, 6: STATU-
TORY CONSTRUCTION.

powers conferred on municipal corporations by said paragraph 2 is "to appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation."

Paragraph 3 is "to levy and collect taxes for general and special purposes on real and personal property." There is nothing in either paragraph requiring a different construction than as before given, and nothing to change the effect of the limitation in paragraph 71, *supra*. If there had been nothing in the act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for a tax of one-twentieth of one per cent. And the case is thus brought directly within the maxim, "*Expressio unius est exclusio alterius*." *U. S. v. Macon Co.*

But it is further insisted by the complainant that it invested \$115,000 in the construction of its waterworks system, and has fulfilled all the conditions in the contract to be by it performed; and that the defendant town corporation has received the benefits accruing to it by the terms of said contract; and that it should be required and bound to pay for the same according to the terms and conditions of said contract; and that it should not be permitted to repudiate its obligations therein contained; and that it would be contrary to public policy, and a violation of its public duty, to permit it so to do. With the conscience of the defendant corporation (if it has any), its moral obligations, or the question of public policy, if any such question is here involved, this court in this cause, as it is here presented, has no concern whatsoever. The question of this court is one purely of law, as to the right of these two corporations, and must be considered and determined as presented to us on the bill and the answer. And we have said before that the trustees of the defendant had no authority in law to enter into the said contract in such a manner as to bind

the defendant town to pay for water rents any sum in excess of the proceeds derived from a levy of two mills on each dollar on the assessed valuation of all property subject to taxation within the corporate limits of the defendant town each year during the continuance of said contract. This they were authorized to do, and no more. If the representatives of the complainant had, before they entered into the contract, turned to the public statutes under which it was made, they would have seen what is apparent to us, and what would seem no two persons of ordinarily sound and discriminating judgment could have arrived at a different conclusion, was a clear, distinct, and positive prohibition against the payment of more than the proceeds arising from said two-mills levy. These statutes were

public notice as to their contents, and alike
STATUTES: notice: binding on both corporations. The complain-
estoppel. ant knowing, as it is presumed to know, that the

defendant was limited by the statute of its creation to a two-mills levy for the discharge of its obligation under ordinance number 10, it should not be heard to complain that the trustees of the town refused to transcend that power. Complainant made this contract with its eyes open, and when the law advised it that its two-mills levy was sacred against the demand of other creditors, furnishing protection just as necessary for the well-being of citizens as complainant. It also advised it that the other eight mills within the ten-mill limit of taxation for all purposes was sacred from a claim of this nature. "The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of the purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound, so, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder

can not require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulty in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We can not create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent has been regularly levied and applied, and no complaint is made as to the levy of the one-half of one per cent for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order." U. S. v. Macon Co., *supra*. And so, in *Law v. People*, 87 Ill. 385: "It is said that to so hold will work great hardships and injustice on the holders of these certificates of indebtedness. The same may be frequently said of any other persons who violate the law, or act contrary to its provisions. The persons loaning this money did it in the face of this constitutional provision, and the prohibition contained in the sixty-second section of the charter. The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters; and all persons dealing with them must see that the body has power to perform the proposed act. * * * But, should it work hardships to individuals, that by no means warrants the violation of the plain and emphatic provision of the constitution. The liberty of the citizen, and his security in all his rights, in a large degree depend upon a rigid adherence to the provisions of the constitution and the laws and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. The will—it may be unbridled will—of the judge would usurp the place of the constitution and the laws, and the violation of one provision is liable to speedily become a

precedent for another, perhaps more flagrant, until the constitutional and legal barriers are destroyed, and none are secure in their rights." *Coler v. Cleburne*, 131 U. S. 162 (9 Sup. Ct. 720).

Under our form of government there is no power more frequently used as an abuse than the power to levy and collect a tax, and, while it is absolutely necessary to levy and collect taxes sufficient for the proper and necessary support of the government, either general, local, or special, yet experience taught that this power has been often used to oppress the citizen, and to deprive him of his property and his natural rights, and only too often for the benefit of the reckless or careless adventurer and speculator; and then, when an attempt is made to check them in their adventurous and reckless career by invoking the aid of the law in behalf of the legal rights of the citizens, they cry out, "Repudiation!" There is no such thing as repudiation when there was no original authority vested in the taxing power by which it is sought to levy and collect the tax. And courts always have and always must arrest any attempt to enforce the collection of a tax when it is apparent that the power to so do was not originally and clearly vested in the taxing power. A case which tested the very foundation, strength and stability of our government more thoroughly than any other, perhaps, was *McCulloch v. Maryland*, 4 Wheat. 316, in which Marshall, the great chief justice, said: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create. * * * But all inconsistencies are to be considered by the magic of the word 'confidence.' Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse to presume which would banish that confidence which is essential to all governments." Incidents are not infrequent where municipalities, through the power to tax, have attempted through that power to illegally and inequitably oppress private corporations of a quasi public nature, and courts have been

compelled to restrain such unauthorized efforts. And were courts to permit careless, pliable or corrupted trustees of corporations to use their pseudo authorities unbridled, the power to tax would certainly in many instances carry with it the power to destroy. And the laws so authorizing the taxing power must be construed liberally in favor of the citizen, and strictly against the power invoked to enforce it. *Webster v. People*, 98 Ill. 343; 15 Am. and Eng. Ency. Law, 1116.

It is contended by the complainant that our general incorporation law for the organization of cities and towns is taken from the Iowa statute on the same subject. That may be true, but it is almost a verbatim copy of the Colorado statute,

and we feel satisfied that the construction put upon the statute by the supreme court of Colorado is in effect to support the construction here

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STRUCTION.

given our own statute. *People v. May*, 10 Pac. 641; *Sullivan v. City of Leadville*, 18 Pac. 736; *Town of Durango v. Pennington*, 7 Pac. 14; *Lake Co. v. Rollins*, 130 U. S. 662 (9 Sup. Ct. 651); *Dixon Co. v. Field*, 111 U. S. 83. "It is provided by statute that cities have the power to erect waterworks, or authorize the erection of the same; and where such authority is granted to individuals or corporation the city may authorize a charge for the use of the water to be collected from the individuals using the same; and a special tax not exceeding five mills on the dollar in any year, in addition to all other taxes, may be levied for the purpose of paying the expenses and operation of works and which tax, with the water rents, shall be sufficient for that purpose." * * * The obligation of the city is to levy the tax, and see that the amount collected is applied to the specific purposes. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the city, and it is difficult to conceive that there can be such a thing as a debt which is never to be paid. No burden is created thereby, and there can not be such an indebtedness." *Water Co. v. Woodward*, 49 Iowa 58.

It is contended by counsel for complainant corporation that the case of Creston Waterworks Co. v. City of Creston, recently decided by the supreme court of the state of Iowa, and reported in 70 N. W. 739, is decisive of the question at issue here, in which that court held in that case "The limitations in section 643, McClain's Ann. Code, are not upon the power to contract for a supply of water for public use, but upon the power to levy this special tax in aid of the payment therefor. When, within the limit of the five-mill tax, the supply can be thus paid for, it must be so paid, but when that source is not sufficient the deficiency may be paid from the general revenues." It may be said that section 643 of the Iowa statute (1 McClain's Ann. Code) is substantially the same as paragraph 71 of section 1622 of our statutes. The distinction here drawn in the case is between the power to contract for a thing and the power to raise money by taxation to pay for the thing contracted for, and is evidently based upon the well-established principle that a city or municipality has two classes of powers, namely, governmental or public power and the proprietary or business powers of a quasi public power. nature. The first is derived directly from the legislative grant, and the second from the discretionary powers inherent in the officers of the municipality, and it is not within the province of a "court to contract or clip the legislative grant," or to restrain or circumvent the discretionary grant or power, so long as it is founded upon sound discretion and good business principles, transacted in good faith, and within the scope of the discretionary powers. *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271, and cases cited. In the case under consideration the board of trustees of defendant town had a discretionary grant or power to enter into a contract with complainant corporation for the construction of the waterworks, the quantity of the water supply to be furnished, the number and size of the hydrants, and the price of the hydrant rentals to be paid, the size and extent of the water mains, and the period for which the contract should run—within, of course, the statutory period—the

pressure and quantity of water, and the price to be paid by private consumers of the water, etc. The legislative grant prescribed the manner in which the revenues should be raised with which payments for the water used by the municipality should be made, and restricted this grant to a special tax levy of two mills on each dollar of taxable property each year, and such other sums as should be realized from the private consumers; and it also gave the authority to make the contract, and prescribed the time within which it should run, and to fulfill the conditions of the contract so made. But the power to make the contract and to execute the proprietary grant and the business portion of a quasi public nature did not carry with it the power to depart from the course prescribed by the statute for raising revenues with which to pay for the supply of water so contracted to be furnished. To so hold would be to confer upon the trustees of a municipality the power to abrogate the plain provisions of the statute, which says: "Provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year." Comp. Laws, sec. 1622, par. 71. It has been seen that the revenues of the defendant town realized from all sources in any one year were not sufficient to meet the current expenses of the municipality, and to hold that the deficiency arising after exhausting the sum realized from the two-mill levy might be made up and supplied from the general revenue would be to permit all the revenues to be consumed in the payment of water rentals, and to allow all other municipal obligations to remain unsatisfied, because it has been before shown (section 1724, Comp. Laws 1884) that no more than one per centum ad valorem shall ever be levied or collected for all municipal purposes by any town or city corporation organized under this act, and "no indebtedness shall be incurred which will require any greater annual expenditure than said one per centum per annum will fully pay off and satisfy." If it shall appear that the sum to be realized from a two-mill levy is insufficient to satisfy the water rentals contracted for, that is a matter for legislative, and not judicial, determination. It is not reasonable

to presume that the legislature intended to confer upon the boards of trustees of municipal corporations the power to make contracts within the scope of their administrative duties which would consume all the revenue derived from the ad valorem tax of the municipality for one single purpose—in this instance, in satisfaction of water rentals—and leave all other obligations incurred by them to remain unsatisfied. We do not think the authority directly in point for the other reason that the five-mills levy that was the maximum to be levied rested, not on the entire taxable property in the corporated limits, but only in that receiving benefit and protection, while under our statute the special tax for water runs to everything taxable in the same way that the general tax does. Also the fact of there being an absolute inhibition against levying more than eight mills other than for water is a feature not referred to in the cases last cited, and this is a distinction also, in our view, important. The Montana state statute provides that “the amount of corporation taxes to be assessed and levied in any one year * * * for general municipal or administrative purposes shall not exceed three-fourths of one per centum, and for fire and water purposes one-half of one per centum on the assessed valuation of such property and such special assessments as may be levied from time to time.” Laws 1889, p. 185, sec. 16. In passing on this statute in *State v. Mayor, etc., of City of Great Falls (Mont.)*, 49 Pac. 15, the court said: “We are of the opinion that this law became part of the contract embodied in said ordinance, and that relators had a right to insist that, in so far as may be necessary to pay what was due it for hydrant rentals in accordance with the rate prescribed in the ordinance contract act, a special tax, as provided for in that act, should be levied annually; of course, in only such sums as should be needed, and not exceeding the five-mill limit. The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder; and the legislature in said act contemplated at the time that cities of the territory should pay

for water used by them for sewerage and fire purposes from taxes levied and collected for that specific purpose."

In the case at bar there is no complaint that the property subject to taxation has not been properly assessed, or that the

CONTRACT: specific performance: jurisdiction.

proceeds of the two-mills levy have not been properly collected and applied; nor that the privileges granted complainant corporation constitute an exclusive franchise in the nature of a monopoly, and therefore void for that reason.

These questions would have to be determined in another action. *Coy v. Lyons City*, 17 Iowa 1, was a mandamus proceeding, and not applicable to the case at bar. Almost all of the Iowa authorities cited are with respect to indebtedness, and we believe, after a careful and considerate examination of all of them, that they do not apply, or in any material respect differ from the position here taken. It is insisted by complainant that the case of *City of Valparaiso v. Gardner*, 97 Ind. 1, supports its position, but we are of the opinion, after a careful examination, that it is not in conflict with the conclusions we have arrived at in the cause at bar. All that was decided in that case was as to what constitutes an indebtedness, and we fully concur in the conclusions stated by that court. It held, in substance, that municipal bonds, or negotiable obligations of any kind, did constitute an indebtedness, but that a contract to pay a certain fixed sum per month or per year for a certain term of years did not constitute an indebtedness, within the meaning of the constitutional or statutory limitations. We do not hold that the contract in question here creates an indebtedness as contemplated by our statute or the act of congress, by which the complainant agreed to furnish and supply water from forty-four hydrants, for which defendant agreed to pay semi-annually the sum of \$1,962.50 or \$3,925 per year for twenty-five years, making a total sum for that time of \$98,125. If that were an indebtedness, the contract would be clearly void, because it would be for an indebtedness beyond the limitation of four per centum prescribed by the act of

congress approved July 30, 1886, as well as the statutory limitation. The complainant might fail to perform its part of the contract, or the defendant might forfeit its rights to receive the water some time during the continuance of the contract, and on the occurring of either event the contract would, on a proper showing, be declared at an end, and no further obligation would rest on either party to the contract. It does not constitute an indebtedness for the whole amount in praesenti. It is a continuing contract from year to year, and is binding on both parties, so long as the conditions therein are not broken. There is nothing negotiable about it in the legal sense of the term. Dill. Mun. Corp. (4 Ed.), sec. 136. The trustees of defendant town corporation had no authority to enact and enforce ordinance number 64, passed May 23, 1895, so as to in any manner change or affect the appropriations then existing for that fiscal year as provided for by ordinance number 59, enacted in March, 1895, for the fiscal years 1895 and 1896; and it is therefore void to that extent.

Section 1636, Comp. Laws 1884: "The fiscal year of each city or town organized under this act shall commence on the first day of April in each year, or at such other time as may be fixed by ordinance. * * * The * * * board of trustees in towns shall, within the last quarter of each fiscal year, pass an ordinance to be termed an annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sums of money as may be deemed necessary to defray all expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amounts appropriated for each object or purpose." Ordinance number 59 seems to have been passed in accordance with this statute, and should not be permitted to be changed, in so far as its appropriations are legal, by ordinance number 64, which seems to have been passed on May 23, 1895, after the time provided by the statute. The trustees may fix any time for the beginning of the fiscal year, so long as it does not change

appropriations already made in regular and orderly manner. *Sullivan v. City of Leadville* (Colo. Sup.) 18 Pac. 736. The statute (Comp. Laws, sec. 1649) requires the treasurer of the town to keep a book, and to register therein each town order, warrant or other certificate of such town indebtedness in the order in which it is presented, whether it is paid at the time of such presentation or not. "Sec. 1650. Every fund in the hands of the treasurer of any such city or town of this territory for disbursement, shall be paid out in the order in which the orders drawn thereon and payable out of the same shall be presented for payment." The trustees of the defendant town had no authority to pass and enforce ordinance number 65, by which it was attempted to make town warrants issued after June 1, 1895, receivable in payment of town licenses. The law provides that they shall be paid in the order of their presentation as they appear from the book of registry required to be kept by the town treasurer, and not otherwise. The purpose of this ordinance is bad, in that it may permit speculations in town warrants, and might lead eventually to the issuance of warrants not authorized. And it is an effort to divert public funds from their proper channel, and it is void to that extent. *Fazende v. City of Houston*, 34 Fed. 95. It is not quite clear as to just what permanent and final relief complainant could obtain, even though the bill should be sustained, and the prayer granted in all its parts, because the prayer is, first, for specific performance of ordinance number ten, for the enforcement of the contract. This court, in a proceeding of this nature, may declare the validity of the contract; but, if the trustees should refuse to make the levy contended for—which it is alleged and admitted they have done—then mandamus must be resorted to, to compel them to make it. This is in reality the foundation of this whole proceeding. We think an action at law by mandamus to compel the levy to have been made would have disposed of the whole matter at once. "(1) If the city [in this cause the town] is liable for this money, an action at law is the appropriate remedy. The action for money had and received to the plain-

tiff's use is the usual and adequate remedy in such cases, when the claim is well founded; and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely, a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings. In this view the present bill fails for want of equitable jurisdiction. (2) But there is no more reason for a recovery on the implied contract to repay the money than on the express contract found in the bonds." *City of Litchfield v. Ballou*, supra. So, if the warrants upon which payment is sought here are valid, an action at law is the proper remedy to enforce their payment. They have been issued, and are claimed to be outstanding obligations against defendant town, and it says they are void, and therefore declines to pay them. Then, if in any action at law judgment should be entered in favor of the legal holders, and defendant's trustees should decline to provide for their payment, mandamus would be the proper remedy to compel the necessary levy. *State v. Mayor, etc., of City of Great Falls (Mont.)*, 49 Pac. 15; *Illinois Trust & Savings Bank v. Arkansas City*, 22 C. C. A. 171; 76 Fed. 271. We conclude that ordinance number ten and the contract made thereunder are not void, but that the language of section eleven of said ordinance, that the said town agrees to levy and collect a tax sufficient, etc., means and should be construed as an obligation for the town to exhaust its power, if necessary, to collect a tax sufficient, etc., within the limit of levying two mills upon the entire taxable property within its corporate boundaries. This provision of the law is to be read into the ordinance and the contract thereunder. As the town has, heretofore, it is undisputed, more than complied with its obligation by paying an amount in excess of what could have been derived from a two-mill levy, and as ordinance number 64 provides for the entire proceeds of a two-mills levy being paid to complainant, it is apparent its bill is without equity, and should be dismissed. The decree entered in the court below is reversed, and the bill of complaint will be dismissed, and an order will be entered

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struction.

directing the lower court to dismiss the bill at the cost of complainant, the Raton Waterworks Company; and it is so ordered.

Collier, Hamilton, and Bantz, JJ., concur.

[No. 717. August 25, 1897.]

IN RE LEONARD LEWISOHN et al., Petitioners.
Certiorari.

CERTIORARI—FILING OF DECLARATION—ORDER NUNC PRO TUNC—JURISDICTION.—On certiorari, where a nunc pro tunc order was made in each of two causes, and the order of one cause was in identical language with that of the other, and both made the same day, reciting that the declaration had been left with the clerk, and that the advance fee required by law had in fact been paid, and there was no averment in the petition in conflict with these recitals—Held: That a paper left with the clerk for filing in a cause, whether marked “filed” or not, is a paper in the cause, and the court had jurisdiction to act in regard to the same. Comp. Laws, sec. 1867.

1D.—Held: Where, as here, it is clear that the district court had jurisdiction to make the order sought to be vacated, this court will not consider the question whether or not the writ of certiorari, not being in aid of appellate jurisdiction, can legally issue to that court. Smith, C. J., dissenting.

Application ex parte of Leonard Lewisohn and J. T. McLaughlin, for writ of certiorari to the First Judicial District Court, Santa Fe County. Writ discharged. Smith, C. J., dissenting.

The facts are stated in the opinion of the court.

FRANCIS DOWNS for petitioners.

The writ of certiorari is a common law writ. 4 Cy. of P. & P. 18.

As to question of jurisdiction see: Territory v. Valdez, 1 N. M. 536; 4 Cy. P. & P. 103, and citations; Comp. Laws,

1884, sec. 1876; Id., sec. 1836. See, also, U. S. Rev. Stat., sec. 2326.

The rule is universal that no act shall be done nunc pro tunc, which shall work injustice to a party in court. *Waldo, Hall & Co. v. Beckwith*, 1 N. M. 97. See, also, *Secor v. Leroux*, Id. 391; *Gray v. Brignardello*, 1 Wall. 636; *Downey v. Rogers*, 2 L. D. 708, 16.

Judicial discretion is to be exercised in discovering the course prescribed by the law; never the arbitrary will of the judge. *Tripp v. Cook*, 26 Wend. 152; *Platt v. Monroe*, 34 Barb. 293; *Osborn v. U. S. Bank*, 9 Wheat. 866; *Comm. v. Leshner*, 17 Serg. & R. (Pa.) 164; *State v. Cummings*, 36 Mo. 278; 34 Ala. 235; 46 Id. 310; 4 Ia. 283; 25 Miss 286.

COLLIER, J.—The writ of certiorari applied for in this case is not in any way in aid of the appellate jurisdiction of this court, but to have reviewed the records of two causes in

the district court of Santa Fe, and to have set aside a nunc pro tunc order in each, as being

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filing of declaration:
order nunc pro tunc:
jurisdiction.

made without jurisdiction. The nunc pro tunc order in one case is in identical language with that in the other, and both were made the same

day. After entitling the case, the order reads

as follows: "It being made to appear to the court that plaintiffs left with the clerk of this court the declaration in the above cause on the evening of May 21, 1895, and that it was not filed by the clerk for the reason that plaintiffs did not pay the advance fee as required by law, and that such fee has been paid at this date, it is ordered that the clerk file said declaration as of the date of May 21, 1895; and it is so ordered. May 24, 1895. N. B. Laughlin, Associate Justice," etc. It is to be noted that this order recites that the declaration had been left with the clerk, and that the advance fee required by law had in fact been paid, and there is no averment in the petition for certiorari in conflict with these recitals. It should be assumed, then, that both the declaration and the advance fee were in the hands of the clerk when the order was signed. Section 1836 of our Compiled Laws provides that "it shall be

the duty of the clerk when any paper is filed in his office immediately to enter on the back thereof his certificate of the day on which it was filed." Therefore it appears that the suitor delivering to the clerk a paper which should be filed in his office files same, and the clerk's certificate on the back thereof is merely the evidence of the filing. This appears still more clearly by what follows in the same section. If the clerk neglects to place his certificate on the back of the paper the court may, in its discretion, "guided by the justice of the case," by an order nunc pro tunc, direct that the certificate be entered. Here is an express statutory provision that, whether a paper is marked "Filed" or not, a nunc pro tunc order may be made in reference to the same. The statute considers a paper left with the clerk for filing as a paper in the case, and, if it is, the court has jurisdiction to act in regard to the same. Section 1867, Comp. Laws, also, shows that if a declaration or a bill is left with the clerk with the intent that process shall immediately issue thereon, that makes the commencement of an action, and that such intent is to be presumed. Plaintiffs' attorney left with the clerk the declarations on May 21st, and the advance fee afterwards; all prior to the signing of the nunc pro tunc order. Whether there was error in the nunc pro tunc order can not be considered by us, but only whether or not there was jurisdiction to make the order. We think there undoubtedly was jurisdiction, and this writ should be discharged. We refrain from passing upon the question whether or not this writ, not being in aid of the appellate jurisdiction, can legally issue to the district court, as it is clear that there was jurisdiction to make the order sought to be vacated. An order should be entered discharging this writ, and it will be so ordered.

CERTIORARI.

Hamilton and Bantz, JJ., concur.

SMITH, C. J. (dissenting).—I can not concur in the conclusion of my associates, as I can not conceive that the existence of jurisdiction confers the authority to assume it prior to

its acquisition. Such retroactive operation would extend limitations upon actions, and bestow upon courts the power to annul legislation of restrictive character. Jurisdiction obtained is prospective in operation, in personam et in rem, and it is illogical that in its exercise it should be deemed legitimate to affect its subject before the commencement of the litigation bestowing it. In this case the institution of the suit by the plaintiffs was not in conformity with the exactions of the department, absolute in its right to prescribe rules and regulations in the premises, and the time within which it should have been commenced having expired. I do not recognize that it was in the power of the judge to deprive the petitioners of their advantage by an endeavor to protect the plaintiffs against their own default. "The leading object of the writ of certiorari is to keep inferior judicatories within the bounds of their jurisdiction; and where any such tribunal, judicial or quasi judicial, has proceeded without any jurisdiction, or in excess thereof, certiorari lies to correct the error." It must be conceded that the fiat of the judge in this case was an assertion of authority beyond his rights. Being without jurisdiction on May 21st, it is beyond achievement that he could possess himself of it at that date by any judicial legerdemain at a subsequent date, and any order on the twenty-fourth of May, presuming to operate prior to its issuance, was in excess of his jurisdiction. If such power as was practiced in this case be within the purview of a judicial official, and the aggrieved party is limited for redress to the prolix proceeding of appeal, his rights may be lost by the unavoidable delay in such effort to secure them. It appears that grave injustice and injury has been done the petitioners by the order of the judge attempting to save to the plaintiffs the limitation within which they should have sued; and it would seem that this court, even if there were legitimate doubts as to the propriety of allowing the writ as strictly applied at common law, should have solved the problem in behalf of the petitioners, in deference to the extension of the writ, in many states, by judicial enlargement even to the function of reviewing and correcting illegalities

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and irregularities in proceedings. But an order nunc pro tunc is, by its terms, limited, in its retrospective effect, to the time when the right to issue any order had accrued, when jurisdiction had attached, and, if it exceeds this extent, it is a nullity for its excess of jurisdiction.

[No. 714. August 25, 1897.]

W. P. CUNNINGHAM et al., Plaintiffs in Error, v. L. D.
SUGAR, Defendant in Error.

TRESPASS—MEASURE OF DAMAGES—INSTRUCTION.—In an action of trespass for damages for the wrongful seizure by the sheriff of an ordinary stock of merchandise in attachment, where plaintiff resumed business, and realized the profits of it, an instruction of the court authorizing a recovery of the profits up to the time of trial, was error.

ID.—EXEMPLARY DAMAGES—INSTRUCTION.—In such action, an instruction of the court allowing exemplary damages was without warrant, in the absence of any evidence that the plaintiffs in the attachment suit were guilty of gross negligence or malice in suing out the attachment.

Error, from a judgment for plaintiff, to the First Judicial District Court, Santa Fe County. Reversed and remanded, with directions.

The facts are stated in the opinion of the court.

CHILDERS & DOBSON, for plaintiffs in error.

The instructions of the court entitling plaintiff to recover damages up to the date of rendition of the verdict, if the jury found for plaintiff, was erroneous. 26 Am. and Eng. Ency. Law, 674; Gardner v. Field, 1 Gray, 151; Cattle Co. v. Mann, 130 U. S. 78; Insurance Co. v. Conard, 1 Bald. 138; Sedg. Meas. Dam. (3 Ed.) 559; The Appollon, 9 Wheat. 362; The Amiable Nancy, 3 Id. 546; La Amistad de Rues, 5 Id. 385; Sedg. Meas. Dam. 41, 558; Richardson v. Janlsofelse, 23

S. W. Rep. (Tex.) 815; Steele v. Metcalf, Id. 474; Sweigreit v. Finley, 22 Atl. Rep. (Pa.) 702; Russell v. Huiskamp, 42 N. W. Rep. 525; Warren v. Kelly, Atl. Rep. (Me.) 49; Townsend v. Foutenot, 8 South. Rep. (La.) 616; Neese v. Rodford, 19 S. W. Rep. (Tex.) 14; Casper v. Clifflen, 63 N. W. Rep. (Minn.) 737, and Anderson v. Sloan, 40 Id. (Wis.) 214, especially. See, also, as to necessity of allegation of special damages in declaration: 5 Ency. Pl. and Pr. 719 et seq.; 5 Am. and Eng. Ency. Law, 50; 1 Suth. Dam., 764; Parker v. Lowell, 11 Gray, 353; Adams v. Barry, 10 Id. 361; Dickinson v. Boyle, 17 Pick. 78; Parker v. Burgess, 24 Atl. Rep. 743; Richter v. Meyer, 31 N. E. Rep. (Ind.) 582; Railway Co. v. Neafus, 185 S. W. Rep. (Ky.) 1030; Montgomery v. Locke, 11 Pac. Rep. 874; Mallory v. Thomas, 33 Id. 757; also, 5 Ency. Pl. and Pr. 741; Stevenson v. Smith, 28 Cal. —; Donnell v. Jones, 48 Am. Dec. 59; Hearn v. McCaughan, 66 Id. 588; 1 Chitt. Pl. 395, 399; Achison v. Telegraph Co., 96 Cal. 641; Louis v. Merchant, 16 S. W. Rep. (Tex. App.) 538.

There was no evidence in this case which would justify exemplary damages, and the court erred in giving an instruction authorizing them. Crymble v. Mulvaney, 40 Pac. Rep. 502; Neese v. Radford, *supra*; Anderson v. Sloan, and other cases cited *supra*.

EDWARD L. BARTLETT and J. H. SUTHERLIN for defendant in error.

This was an action in tort, and in such case the law presumes damages to plaintiff. 1 Suth. Dam. 12; Cooley on Torts, pp. 64, 69; 1 Hill. on Torts, p. 74; 5 Am. and Eng. Ency. Law, 4.

An officer is liable for levying on goods of another than the person named in his process, and he levies thereon at his peril. Buck v. Colbath, 3 Wal. 344; Cooley on Torts, p. 396; Averby v. McGee, 63 Am. Dec. 49; Insurance Co. v. Adams, 9 Pet. (U. S.) 603; Lanman v. Fusier, 111 U. S. 19.

Where a party is injured by the wrongful acts of public officers he is entitled to actual damages; but if the act be done

under aggravating circumstances and in violation of plain right, or be attended with malice, he may recover consequential, and even punitive, damages. *Rodgers v. Fergusson*, 36 Tex. 545; *Railway Co. v. Prentice*, 147 U. S. 107; *Scott v. Donnell*, 165 Id. 88; *Barry v. Edmunds*, 116 Id. 562, 565. See, also, 2 *Thomp. on Jury Trials*, sec. 2065; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 459, 460; *Publishing Co. v. Monroe*, 73 Fed. Rep. 196; *Parker v. Shackelford*, 61 Mo. 68; *Favorite v. Cottrell*, 62 Mo. App. 119; *Malecek v. R. R.*, 57 Mo. 20; *Casey v. Ballou*, 67 N. W. Rep. 98; *Bruce v. Ulery*, 79 Mo. 322, 326; *Johnson v. Camp*, 51 Ill. 219; *Puttebaugh's Pleadings*, 450; *Sanders v. Mullen*, 66 Ia. 728; *Munis v. Herrera*, 1 N. M. 367.

In an action of tort profits lost to business are recoverable by plaintiff. 1 *Suth. Dam.*, p. 121, and note; *Allison v. Chandler*, 11 Mich. 542, 549, 554, 558, 560; *White v. Mosely*, 8 Pick. 356-358; also, consequential damages. *Fur. Com. Co. v. Little*, 19 South. Rep. 443; 1 *Suth. Dam.*, pp. 20, 71, 447, 448; *McAfee v. Crofford*, 13 How. (U. S.) 447.

Exemplary damages are not special, and need not be alleged. *Wilkinson v. Sercy*, 76 Ala. 182; *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Gustafson v. Wind*, 62 Ia. 282; *S. F. & W. R. Co. v. Holland*, 82 Ga. 271; *Davis v. Seeley*, 60 N. W. Rep. 184; *A. G. S. Co. v. Arnold*, 84 Ala. 159; *Express Co. v. Brown*, 67 Miss. 260.

BANTZ, J.—On January 4, 1896, one Goodman sold his stock in trade to L. D. Sugar, who continued in business in the town of San Pedro; Goodman was at the time indebted in a large sum to Mandell Brothers, who on January 30, 1896, sued out an attachment against Goodman, and levied it upon the stock previously sold by Goodman to Sugar, and also upon certain other merchandise which Sugar had added to and mingled with the goods he had bought from Goodman. Judgment was afterwards rendered against Goodman in the attachment suit. This action in trespass was brought by Sugar against Cunningham, the sheriff who levied the attachment,

and also against Mandell Brothers, in whose favor it was levied.

The declaration was in the ordinary form, and alleged the value of the property seized to be \$2,000. It alleged several items of special damages, and alleged damages in the aggregate sum of \$4,500. The defendants (below) pleaded the general issue, and also a special plea of justification.

A bill of particulars was prayed and furnished; it sets out the various items of merchandise seized and their value, and also contains the following items of special damage: (1) "Profits on business from January 30, 1896, the date of taking said goods by defendants, to the date of judgment, per month \$125.00." (2) "Interest on money invested at 12 per cent per annum \$250." (3) "Injury to business standing and credit as merchant in community and all other damages \$500.00." A mass of testimony was introduced at the trial as to whether the sale of the stock by Goodman to Sugar was made in good faith, or was made to hinder, delay or defraud Goodman's creditors, and as to Sugar's information upon that subject. A large amount of testimony was also introduced upon the questions of values and damages. It also appears that Sugar refurnished his store with another stock, and resumed business some time in March, 1896. The jury returned a verdict in favor of Sugar in the sum of \$3,262; and after unsuccessfully moving for a new trial, the defendants brought the trial into this court on writ of error.

The principal matter in controversy is in regard to the correctness of the measure of damages applied to this case in the court's instruction to the jury. The court below authorized the jury to assess as damages (1) the full value of the property seized, (2) the loss of reasonable profits in the business from the date of the levy of the attachment to the time of trial, (3) damages to business standing and credit by reason of the levy.

TRESPASS: measure of damages: instruction.

Leaving out of view wrongs done from a corrupt motive, which will be considered when we come to the subject of exemplary damages, the universal and cardinal principle in all

civil actions, whether *ex contractu* or *ex delicto*, is that "the person injured shall receive a compensation commensurate with his loss or injury, and no more." 1 *Suth. Dam.*, 17; *U. S. v. Smith*, 4 *Otto*, 214; *Brewster v. Van Liew*, 119 *Ill.* 554. No one is held responsible for all the consequences of his wrongful act, but only for those consequences which are natural and proximate; that is, such as might reasonably have been expected under the particular circumstances to ensue; such as according to the common experience and the usual course of events might reasonably be anticipated. 1 *Suth. Dam.* 21; *Woods Mayne, Dam.* [Ed. 1880], sec. 52; *McDonald v. Snelling*, 14 *Allen* 290; *Smith v. Bolles*, 132 *U. S.* 125; *Warwick v. Hutchinson*, 45 *N. J. L.* 61. Damages which flow as the necessary result of the wrongful act need not be specially pleaded, but are recoverable under general allegations; those damages which do not necessarily flow from the wrongful act, but do flow as a natural and proximate consequence of it, are classed as special damages, and to guard against surprise to the defendant, these must be averred specially. 1 *Chitty Pld.* 395; *Roberts v. Graham*, 6 *Wall.* 578; 1 *Suth. Dam.* 763; *Wransky v. Dry Dock, etc.*, 118 *N. Y.* 304; *Butler v. Kent*, 19 *Johns.* 223.

For the conversion of personal property the measure of damage ordinarily is the value of the property at the time of the conversion and interest thereon to the day of the trial. This is the general rule established by the great weight of authority. 1 *Suth., Dam.* 488; *Arkansas Cattle Co. v. Mann.* 130 *U. S.* 78; *Seymour v. Ives*, 46 *Conn.* 110; *Fowler v. Merrill*, 11 *How. U. S.* 375; *Watt v. Potter*, 2 *Mason* 77.

This rule is especially true of articles of merchandise which can be replaced from the commercial markets at pleasure. Interest is allowed as damages for the deprivation of the use of the property, and this is the only damage which can ordinarily flow from the wrong. Whenever a different rule is to be applied it is because peculiar circumstances introduce new elements, calling for the allowance of special damages in lieu of interest. To seize and convert the stock in

trade of an established business not only involves the loss of the value of the property to the owner, but may also carry with it as a natural and proximate consequence, the interruption of his business, and thereby loss to him of profits and trade. If the merchandise may be bought at will in the market, the taking of his stock in trade would be merely a temporary interruption of his business; and it must be remembered that the wrongful act consisted not in interrupting the business, but in the seizure of the property, and therefore the special damage could only continue so long as the interruption may reasonably continue as the natural and proximate consequence of the wrongful act. The question is not what plaintiff may have gained as the fruit of an unrealized speculation, but what he has lost by the act of the defendant. *Smith v. Bolles*, 132 U. S. 129. In the case at bar the property was an ordinary stock of merchandise; it was seized on January 30, and Sugar (plaintiff below) resumed business and realized the profits of it. In *Crymble v. Mulvaney*, 40 Pac. 501, the Colorado court say: "The profits resulting from an injury to the business after its resumption, and until the commencement to the action, and the loss of credit were too remote and speculative, and are not allowable under the clear weight of authority." The same rule was made in *Anderson v. Sloan*, 40 N. W. (Wis.) 222. If he can recover from the defendants for the same period, he would be making the defendants pay again after the interruption of his business had ceased. The court's instruction authorizing recovery of profits up to the time of trial was therefore clearly erroneous.

We will now turn to the question as to the proper rule on this subject. It seems quite clear that when the loss of profits may be assessed as damages, the period for which they may be recovered can not depend upon the time when the plaintiff may have chosen to replenish his stock and resume business; if it did he might wait at ease till the period of limitation was about to expire, and without actually incurring the hazards of mercantile pursuits recover the estimate profits of a long period of idleness. In *Luce v. Hoisington*, an ox had been

seized under attachment and in an action for damages it was held that the failure to raise a crop by reason of being deprived of the use of the ox was not the natural or proximate cause of the wrongful levy; the plaintiff would not allow his land to go uncultivated and then ask the jury to speculate as to his loss. 56 Vt. 436. In *Luse v. Jones*, 39 N. J. 707, the action was for wrongfully seizing a boarding house keeper's furniture, and she was allowed to recover damages to her business through the loss of boarders and by having to turn others away in the interval "before she could with proper diligence furnish her house." In *Allison v. Chandler*, 11 Mich. 555, though damages were allowed for injury to business by disturbing a tenant's possession of a store room he having an established business at that place, the court say: "Where from the nature and circumstances of the case a rule can be discovered by which adequate compensation can be accurately measured, the rule would be applied in actions of tort as in those upon contract. Such is quite generally the case in trespass and trover for the taking or conversion of personal property, if the property (as it generally is) be such as can be readily obtained in the market and has a market value." In *France v. Gaudet*, L. R. C. Q. B. 199, the action was for conversion of a quantity of wine, no other wine of the same brand and quality was to be had in the market, and the owner had procured a purchaser of it at a certain price. The Queen's Bench held that the measure of damage was the actual price at which the wine could have been so sold, this of course included the profits, but say the court, per Mallor, J.: "Under ordinary circumstances the direction to the jury would simply be to ascertain the value of the goods at the time of the conversion; and in case the plaintiff could by going into the market have purchased other goods of like quality and description, the price at which that could have been done would be the measure of damages. It was however, admitted on the trial, in the present case, that course could not have been pursued, inasmuch as Champagne of the like quality and description could not have been purchased in the market so as to enable the

plaintiff to fulfill his contract with Captain H." It was not deemed necessary in that case to determine whether notice of special circumstances of damage is or is not necessary on trover, in order to recover from them, but the learned judge was inclined to think that either express notice must be shown, or arise out of the circumstances of the case. See Sedg. Dam. [4 Ed.], 559.

If by reason of distance from the supply market or like circumstances, an interval must reasonably elapse before business can be resumed, the loss of profits, or injury of business by the diversion of trade, during that period may be shown, as the natural and proximate result of closing up a mercantile store; but this must be based upon actual conditions previously existing for a period sufficiently long to afford reasonable certainty to it as evidence of damage. In Minnesota it is held that the evidence is limited to cases where the business had become so established at the time of interruption as that exemplary damages can not be recovered. *Beveridge v. Welch*, 7 Wis. 465; *Crymble v. Mulvaney* (Colo.), 40 Pac. 501. The wrong must be willful, malicious or the result of gross negligence, and it will be error to charge the jury that such damages can be recovered if defendants at the time had good reason to believe that the act was wrongful. *Inman v. Boll*, 65 Iowa 543. Something more must be shown than "mere disregard of the rights of others." *Wilkinson v. Searcy*, 76 Ala. 176.

The evidence in this case did not warrant the giving of an instruction upon exemplary damages. The attachment was not sued out against Sugar, but against Goodman, the title to the property in question depended upon whether Goodman intended by the sale of it to hinder, delay or defraud his creditors, and whether Sugar was aware of that intent, or was aware of facts and circumstances which would put a prudent man upon inquiry. That was a question depending upon disputed and conflicting testimony, and these were issues submitted in this very case for the consideration of

TRESPASS: exem-
plary damages:
instruction.

the jury. Even if Mandell Brothers were mistaken in their conclusion as to these matters and even though that mistake arose out of negligence it would be no ground for exemplary damages, unless there was gross negligence or malice, and of that there was no evidence. The issue as to ownership is a live one in the case and there is nothing to indicate that it is not now maintained in good faith, or that it was begun in bad faith.

It will not be necessary to notice the other errors assigned. The cause will be reversed and remanded, with directions to grant a new trial.

Smith, C. J., Collier and Hamilton, JJ., concurring.

[No. 710. August 25, 1897.]

**NEW MEXICO NATIONAL BANK, Plaintiff in Error, v.
GEORGE L. BROOKS, Defendant in Error.**

GARNISHMENT—NOTICE—SUFFICIENCY—EXEMPTION.—In a proceeding by garnishment, of which defendant had notice, but it was not shown how he received such notice, where judgment was rendered against defendant and process of garnishment served on his debtor, defendant's counsel drawing the garnishee's answer, with instructions from defendant to garnishee's counsel to file it within the prescribed time, and several conversations occurring thereafter between defendant and them in relation thereto, defendant failing to make any claim of exemption for more than three months—Held: That though defendant might not have known when the answer was filed, he had ample notice of the garnishment proceeding, and sufficient opportunity to make his exemption claim before entry of final judgment against the garnishee.

ID.—FINAL JUDGMENT—RES ADJUDICATA—JURISDICTION.—Held: That defendant having failed to file his claim of exemption before final judgment against the garnishee, such judgment was conclusive of the question, and res adjudicata, and the court without jurisdiction to order the fund garnished to be paid over to defendant.

Id.—EXEMPTION—AFFIDAVIT—PRACTICE, TRIAL.—Held: That an affidavit filed by the defendant in a garnishment proceeding, claiming exemption, is not conclusive, but may be traversed by the plaintiff.

Id.—AFFIDAVIT—ISSUES—TRIAL.—Held: That, in a garnishment proceeding, the issues raised upon the affidavit of defendant and the traverse of its truth by plaintiff, may be tried by the court without a jury, in the absence of any statute prescribing any method of inquiry in such case.

Id.—EXEMPTION LAWS 1887, P. 73—STATUTORY CONSTRUCTION.—Held: That the law of 1887, exempting the personal earnings of the debtor and his minor children, for three months, from attachment or other process, was not intended to encourage extravagance and the evasion of just debts, but for the necessary support of the debtor's family and himself; and that \$3,600 a year is more than sufficient to support comfortably any average family.

Error, from a judgment for defendant on his intervening petition claiming the fund attached as exempt, to the Fifth Judicial District Court, Socorro County. Reversed and remanded, with directions.

The facts are stated in the opinion of the court.

S. BURKHART and J. G. FITCH for plaintiff in error.

The principal question presented here is as to the jurisdiction of the district court, the defendant claiming below that he was not a party to the garnishment proceedings as no formal notice was given to him. The only notice he was entitled to was the demand provided for by Comp. Laws, 1884, sec. 2159, which was given him.

Defendant is not entitled to notice of garnishment proceedings, unless such notice is required by statute. 8 Am. and Eng. Ency. Law, 1127; Phillips v. German, 43 Ia. 101; Gibson v. Haggerty, 37 N. Y. 555.

Exemption is a personal privilege which must be set up by the debtor himself. The garnishee can not claim it for him. Conley v. Chilicothe, 26 Ohio St. 320. Moon v. R. R. Co., 43 Ia. 385; Osborn v. Schutt, 67 Mo. 712; Howland v. R. R. Co., 36 S. W. Rep. (Mo.) 29; Ely v. Blackmer, 20 South. Rep. (Ala.) 570; Thomp. Home and Exempt., sec. 860

et seq. See, also, Wap. Attach. and Gar., pp. 527, 528; same, pp. 777, 882; 8 Am. and Eng. Ency. Law, 1225; Miller v. Sherry, 2 Wall. 273; Rector v. Ratton, 3 Neb. 171; Barton v. Brown, 68 Cal. 11; Haas v. Straw, 91 Ind. 384; State v. Manley, 15 Id. 8; Perkins v. Bragg, 29 Id. 507; Randolph v. Little, 62 Ala. 396; State v. Bernendes, 2 South. Rep. 425; Craft v. Hubbard, 9 South. Rep. (Ala.) 328; Stroner's Ex'r v. Becker, 44 Pa. St. 206; Blair v. Steinman, 52 Id. 423; Jones v. Tracey, 75 Id. 417.

The right claimed by defendant, it is true, is based upon a statute and was unknown at common law, but it is a legal, as distinguished from an equitable, right, and, therefore, triable by jury. Parson v. Bradford, 3 Pet. 443-447; Scott v. Nichols, 27 Miss. 94; 60 Am. Dec. 503.

There is nothing in the statute making the affidavit of defendant, setting up his exemption, absolutely conclusive, nor requiring the court to allow the exemption. Muzzy v. Lantry, 2 Pac. Rep. (Kan.) 1102; Cuching v. Quigley, 28 Id. (Mont.) 337.

WARREN, FERGUSON & GILLET for defendant in error.

The court did not err in permitting defendant to intervene and claim exemption. Mull v. Jones, 33 Kan. 112; 5 Pac. Rep. 288; Phelps v. R. R. Co., 13 Kan. 32; Buckland v. Tonsman, 90 Ala. 503, 8 South. Rep. 68; Crisp v. Fort Wayne, etc., 98 Mich. 648; 57 N. W. Rep. 1050; Wales v. Muscatine, 4 Ia. 362.

The weight of authority is that exemption is a right vested by law, and that it is the duty of the garnishee to claim it for the defendant; and his failure to do so in no manner binds the claimant. Watkins v. Cason, 46 Ga. 444; City of Bedford, 20 Fed. Rep. 57; Pierce v. Chicago, 36 Wis. 283; Mace v. Heath, 51 N. W. Rep. 317, 822; Chicago v. Ragland, 84 Ill. 375.

A claim for exemption can be made at any time before the amount of judgment has been actually paid over to

plaintiff, even if not after that time. *U. P. R'y. Co. v. Smersle*, 36 N. W. Rep. 139; *Iloff v. Arnott*, 3 Pac. Rep. 525; *State v. Judge*, 2 South. Rep. 425; *Randolph v. Little*, 62 Ala. 396; *Clark v. Orvill*, 76 Am. Dec. 131; *Emmons v. Southern, etc.*, 7 S. E. Rep. 332.

In this case the exemption was made to appear by affidavit, and the statute makes no provision for a traverse and trial by jury. *Letts, etc., v. McMaster*, 49 N. W. Rep. 1035; *Bintrolustle v. Woodward*, 7 S. W. Rep. 465; *Will v. Cohn*, 63 Fed. Rep. 759. See, also, *Cooley's Const. Lim.*, 504; *Kelley v. Andrews*, 62 N. W. Rep. (Ia.) 853; *Wriber v. Ford*, 63 Id. (Minn.) 1075; *Bank v. Wilson*, 43 Id. (Wis.) 153; *State v. Judge*, 2 South. Rep. 425.

The court rightly found, from the evidence, that the compensation earned by defendant during the period in question, was necessary for his support and that of his family, in a proper and suitable manner. *Hamberger v. Marcus*, 27 Atl. Rep. (Pa.) 681; *Sydnor v. Galveston*, 15 S. W. Rep. 202; *Howell v. Dowell*, 1 Atl. Rep. 474; *Brown v. Hebard*, 91 Am. Dec. (Wis.) 408.

LAUGHLIN, J.—On June 6, 1894, the plaintiff, the New Mexico National Bank, recovered a judgment in the district court for Socorro county against the defendant, George L. Brooks, for \$10,734.32 and costs. On April 27, 1896, execution was issued directed to the sheriff of Bernalillo county, who called upon defendant to pay the same, or to show sufficient goods, chattels, effects and lands whereof the same might be satisfied, which defendant failed to do, and the sheriff, failing to find property of defendant, at the request of plaintiff served the Atchison, Topeka & Santa Fe Railroad Company with garnishment process. On June 2, 1896, the said railroad company entered its special appearance, and moved to quash the garnishment proceeding. On June 6 this motion was overruled, and the garnishee was ruled to answer plaintiff's interrogatories within ten days. The garnishee accordingly filed its answer, showing that it was indebted to

the defendant, Brooks, on account of his salary as its live-stock agent for the months of April and May, 1896, in the sum of \$400, said salary being \$200 per month. On June 20, the court rendered judgment against the said garnishee for the \$400, admitted to be due defendant by its answer. It was afterwards shown that the defendant, Brooks, had actual notice of these garnishment proceedings, having been promptly notified by the garnishee; that the garnishee's answer was drawn up by the defendant's attorneys, and that defendant himself took said answer to the attorneys of the garnishee with the request that it be filed in time. But it is not shown that defendant knew when garnishee's answer was filed. On October 2, 1896, the defendant, Brooks, filed his petition claiming the money for which judgment had been rendered against the garnishee as exempt, for the reason that it was his personal earnings, and necessary for the support of himself and family. The court thereupon ordered a stay of execution as against the garnishee until the matter could be heard, and defendant thereupon filed a motion to set aside the judgment against the garnishee, or to perpetually stay execution on the same. On October 12, the court overruled this motion, but ordered the money due from the garnishee to be paid into the registry of the court, and allowed the defendant, Brooks, ten days in which to file his claim for the same. The defendant accordingly filed his claim for said money as exempt, and on November 6 the court entered an order, over the objection and exception of the plaintiff, permitting the defendant to intervene and to be heard upon his claim of exemption as to the money collected from the garnishee, and setting the matter down for hearing, the defendant's right of exemption being denied by plaintiff. On December 7 the court made an additional order setting the matter down for hearing, to which plaintiff also excepted. The plaintiff then demanded a jury trial as to the defendant's right of exemption, which the court refused, and plaintiff excepted. The matter came on for trial before the court January 2, 1897, the court holding that the burden of proof was on the plaintiff to show that the money was not

exempt. The court found that the money collected from the garnishee, and then in the registry of the court, was necessary for the support of defendant and his family, ordered that it be allowed as an exemption, and paid over to defendant. Plaintiff filed a motion for a new trial, which was overruled, and thereupon sued out a writ of error.

There will be but four propositions considered in this case: First. Whether the final judgment against the garnishee was *res adjudicata*. Second. Did the court below rule correctly in permitting plaintiff to traverse defendant's affidavit in his intervening petition? Third. Was plaintiff entitled to trial by jury? And, fourth, was the finding of the court supported by the evidence?

The plaintiff in error contends that the judgment rendered against the garnishee is *res adjudicata*, and that, therefore, the court was without any jurisdiction to grant the defendant's intervening petition. It is admitted that the counsel for defendant, Brooks, knew that process of garnishment had been served on the garnishee railroad company, and that his counsel drew up the answer to the garnishment proceedings, and that defendant, Brooks, delivered the answer so drawn up to the counsel for garnishee, and cautioned them to be sure and file it within the time prescribed, and that he knew that the answer was forwarded to the proper officer of the garnishee railroad company to be signed, but that he (defendant) did not know when it was filed in the court, and that defendant, Brooks, took no further notice of the garnishee proceedings until the second day of October, 1896, and more than three months after the final judgment had been rendered against the garnishee. The defendant contends (1) that he was a necessary party to the garnishment proceedings, and that he was not so made a party thereto, and (2) that it was the duty of the garnishee to claim for him, the said defendant, in its answer. With respect to the first proposition, the statute provides as follows, to wit: Section 1945, Comp. Laws, 1884: "The plaintiff may exhibit in the cause

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written allegations and interrogatories at the return term of the writ, and not afterwards, touching the property, effects, and credits attached in the hands of any garnishee. The garnishee shall exhibit and file his answer thereto, on oath; during such term, unless the court for good cause shown shall order otherwise. In default of such answer, or of a sufficient answer, the plaintiff may take judgment by default against him, or the court may, upon motion, compel him to answer by attachment of his body." Section 1946, Comp. Laws 1884: "Such judgment by default may be proceeded on to final judgment in like manner as in cases of the defendant in actions upon contracts, but no final judgment shall be rendered against the garnishee until there shall be final judgment against the defendant." The statute is silent as to the necessity of any process or notice to the defendant after judgment final against him on execution. But it does provide that judgment shall not go against the garnishee until after final judgment against the main defendant. As before stated, the defendant had notice that garnishment proceedings had been served upon the garnishee, but it is not shown how he received such notice. However, he procured the answer for the garnishee to be drawn by his own counsel, delivered the same to the counsel of the garnishee, and cautioned them to see that it was filed seasonably. He had several conversations with one of the counsel for the garnishee about the matter thereafter, yet he failed to make any claim for exemption for more than three months. While he might not have known when the answer was filed, we are of opinion that he had ample notice of the garnishment proceedings, and sufficient opportunity to come in and make his exemption claim before entry of the judgment final against the garnishee. The judgment against the garnishee recites as follows, to wit: "And it appearing to the court by the answer of the said garnishee that the said garnishee is now indebted to the said defendant, George L. Brooks, in the sum of four hundred dollars, which said sum is now due and owing to said defendant on account of his salary as live-stock agent for said garnishee for the months of April

and May, A. D. 1896, it is therefore considered by the court that the plaintiff, the New Mexico National Bank, do have and recover of the said garnishee, the Atchison, Topeka & Santa Fe Railway Company, the said sum of four hundred dollars so due and owing from the said garnishee to the said defendant, George L. Brooks, as aforesaid." The counsel for defendant, on October 12, 1896, filed a motion to vacate this judgment, and the court, on the hearing, denied the motion, and the judgment stands unmodified, and not appealed from. We are of opinion, and so hold, that this judgment is a finality, and a complete bar as against the defendant, Brooks; and that the court was without any jurisdiction to make the order on the second day of January, 1897, requiring the money then in the hands of the clerk to be paid over to the said defendant, Brooks. Exemption is a personal right, and the party wishing to avail himself of that right must make his claim and assert it seasonably. The defendant should have filed his claim before judgment final against the garnishee. This he did not do, and he lost his personal right. "If a judgment debtor suffer property or credits of his to be subjected to garnishment, making no exception or objection till the garnishee has been condemned to pay or deliver for execution, his right of exemption is lost." Waples, Attachm. 527. *Randolph v. Little*, 62 Ala. 396, is a garnishment proceeding similar to the case under consideration, and it was held that the court had no jurisdiction to order the money paid over to the defendant in the original judgment, who failed to file his claim for exemption until after judgment against the garnishee. The court said: "As we have said above, the circuit court had jurisdiction to discharge the garnishee, or to render judgment against him. After the judgment was rendered against the garnishee, that court had no authority to make the order that the money, when collected, should be paid to Russeau. That order was without jurisdiction, is void, and is hereby vacated." It was held in the case of *Miller v. Sherry*, 2 Wall. 237—a case in which the defendant in the original judgment filed his claim for a homestead after final decree had been entered approving the sale of the

homestead, as follows: "In regard to the homestead right claimed by the plaintiff in error, there is no difficulty. The decree under which the sale was made to Bushnell expressly divested the defendant of all right and interest in the premises. It can not be collaterally questioned. Until reversed, it is conclusive upon the parties, and the reversal would not affect a title acquired under it while it was in force." In the case of *Rector v. Rotton*, 3 Neb. 171, in which the defendants claimed for the first time a homestead right to a tract of land sold under a foreclosure sale, on a proceeding for the confirmation of the sale, the court said in commenting on this point: "But I have said the right secured to the head of a family by the homestead act is a personal one, and, being personal, it may, of course, be waived. It may be lost, even where no contract has been made respecting it, by not claiming the protection of the statute at the proper time. * * * The rule of law, applicable alike to proceedings in equity and actions at law, undoubtedly is that, after a judgment or decree in rem against him, it is too late for a party to the record to assert any claim to the property, either as a homestead or otherwise, which might have been made and determined in that suit. Were it otherwise, it would be quite difficult to put an end to litigation." In *Perkins v. Bragg*, 29 Ind. 507, the court, in commenting on the exemption statute of that state said: "The question involved in the case is, can an attachment defendant, after judgment and an order of sale of the attached property, claim it as exempt from sale on the final process issued on such judgment? In *State v. Manly*, 15 Ind. 8, it was held in the negative. It is claimed that that ruling is wrong. The statute on the subject is this: 'That an amount of property not exceeding in value three hundred dollars, owned by any resident householder, shall not be liable to sale on execution, or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied.' It is argued that this provision is broad enough to and does embrace final process on judgments in attachment, in which there is

an order for the sale of attached property. The order of attachment only reaches lands and tenements, goods and chattels, of the defendant, subject to execution. Whether the property attached is subject to execution is *res adjudicata* after judgment in attachment. The judgment against the property is a judgment in rem, and is as conclusive as a judgment against the person." The rule laid down in *State v. Manly*, *supra*, was affirmed. See, also, *Slaughter v. Detiney*, 15 Ind. 49; *Sibbald's Case*, 12 Pet. 492; *Bank v. Beverly*, 1 How. 134; *State v. Bermudez (La.)*, 2 South. 425; *Barton v. Brown*, 68 Cal. 11. This doctrine has been repeatedly affirmed by the supreme court of Pennsylvania under a statute similar to our own. In *Bair v. Steinman*, 52 Pa. St. 423, that court held that: "Though a debtor is entitled to the statutory exemption of \$300 worth of his estate as against the process we call attachment execution, he is to obtain it, as in other cases, by demanding it of the officer when the process is served, or within a reasonable time thereafter. * * * If, as in this instance, he fail to make a demand, a subsequent plea of his rights will not avail him. This was ruled in *Strouse's Ex'r v. Becker*, 44 Pa. St. 206, and we do not see that there is anything else in the case." *Jones v. Tracy*, 75 Pa. St. 417. We think the case of *Muzzy v. Lantry*, 2 Pac. 103, is clearly distinguishable from the case at bar in this. In that case the defendant to the original suit appeared, and filed his affidavit in due form, and claimed the money in the hands of the garnishees before any judgment was obtained against them; and the court properly held that the money was exempt from execution process under the statute, and ordered the garnishees to pay the money due from them to the original defendant in the first instance, and no judgment was entered against them in favor of the plaintiffs. That is a very different case from the one under consideration. Defendant in error cites *Mull v. Jones (Kan. Sup.)*, 5 Pac. 388, as authority in support of his contention that the judgment in this case is not *res adjudicata*. In that case the plaintiffs, Mull & Son, obtained a judgment

against the defendant Brown, and about a year thereafter instituted garnishment proceedings against the garnishee defendant Jones, and at the trial it was found that Jones, the garnishee, was indebted to defendant Brown, and the garnishee was directed to pay the money into the justice court, which he refused to do, and the plaintiffs, Mull & Son, instituted proceedings under a statute of that state to recover the money from Jones, the garnishee. The plaintiffs contended in that case that the order by the justice of the peace on the garnishee to pay the money into court was conclusive on the garnishee, but the court held that it was not on the decision in the case of Board v. Scoville, 13 Kan. 17. In speaking of such orders made by a judge pro tem of the district court, and by the justice of the peace, the court say: "Neither of said orders is a judgment. The making of them is not an adjudication between the parties. It does not determine their ultimate rights. It simply gives to the creditor the same right to enforce the payment of the money from the garnishee that the debtor previously had. It is, in effect, only an assignment of the claim from the debtor to the creditor. The creditor gains no more or greater rights than the debtor had, and the garnishee loses no rights, and the payment of the money can be enforced from the garnishee to the creditor only by an ordinary action." That decision was based on section 490 of the Code of Civil Procedure of Kansas, which directs that the garnishee pay the money found due from him into court, and is not a final judgment against the garnishee and in favor of the plaintiff. In the case at bar the judgment of the district court was final, and the plaintiff was authorized to recover the sum of \$400 from the garnishee, and this judgment was in compliance with the statute (section 1948, Comp. Laws 1884): "If by the answer not excepted to or denied, it shall appear that the garnishee is possessed of property or effects of the defendant, or is indebted to the defendant the value of the property or effects, or the debt being ascertained, judgment may be rendered against the garnishee." In Mull v. Jones, supra, the contention was between the plaintiffs and the

garnishee, and was decided upon the theory that it was the duty of the garnishee to disclose that the money in his possession due the defendant was exempt, and therefore not subject to execution; and in that case it was expressly held that: "While exemption is, in a certain sense, a privilege, and one which may be waived by the person entitled thereto, yet it is a privilege which continues in a debtor until he waives the same. It will hardly be contended that the defendant has forfeited or waived that privilege until he has had notice of the garnishment proceedings. If, upon notice, he should expressly waive the exemption, or if, after notice, he should neglect and refuse to assert the privilege and claim the exemption, it possibly might be treated as an implied waiver of his right which would protect the garnishee, in case he should pay over the money or deliver the property, from any subsequent action brought by the debtor against him to recover the same." That is exactly what we hold the defendant, Brooks, did in this case—that he had full notice of the garnishment proceedings, and procured his counsel to prepare and draw the answer for the garnishee, and refused to assert his exemption claim, and then for more than three months after the final judgment against the garnishee neglected to make any claim of his privilege of exemption.

We are of opinion that the principle is well established upon reason and authority that under statutes similar to our own a final judgment in favor of the plaintiff and against the garnishee, after notice to the defendant of the garnishment proceeding, in whatsoever way obtained by him, and his failure, neglect, or refusal to assert his personal privilege of the right of exemption seasonably, is *res adjudicata*. The position taken by defendant in error that he was a necessary party to the garnishment proceeding, and should have been served with some kind of process notifying him of that fact, is untenable. He was already a party to the judgment against him, and was in court for all purposes pertaining to the enforcement of that judgment. When the execution was placed in

TRIAL judgment:
res adjudicata.

the hands of the sheriff of Bernalillo county for collection, he called upon the defendant to pay it, which he refused to do. He then demanded that the defendant point out property to be levied upon. This the defendant refused also to do. The sheriff then served the garnishment proceeding upon the agent of the garnishee railroad company. This was all the statute required the execution plaintiff to do. There is no statute requiring anything else to be done, and in the absence of a statute it is not necessary to give defendant in execution any further notice. 8 Am. and Eng. Ency. of Law, 1127; Phillips v. Germon, 43 Iowa, 101. It has been held in many states that the garnishee must protect the exemption rights of his creditor under the exemption statutes of those states, but, as the garnishee is not a party to this case, we refrain from expressing any opinion upon that question.

2. Defendant in error contends that the affidavit filed by him claiming the exemption was conclusive, but the court permitted plaintiff to traverse and deny the facts set up in it; and we think this is the proper practice, and that the court did not err in this ruling. If an affidavit made by a defendant, claiming that the money or property garnished is exempt, and necessary for the support of himself and family, should be held not traversable, then all parties to the proceeding would be concluded from inquiring into the truth of such allegations, and any defendant might then claim and hold anything he might swear was exempt property. The exemption statute was never intended for such a purpose, but it only gives a personal privilege to claim and hold the things named in the statute; and whether the things claimed in the affidavit are within the purview of the statute is the very matter to be determined in a proper manner, and this can be done only upon the traverse of the truth of the affidavit.

3. Did the court commit error in denying plaintiff's demand for a jury to try the issues raised upon the affidavit of

EXEMPTION: affidavit: practice: trial.

AFFIDAVIT: issues:
trial.

defendant and the traverse of the truth by the plaintiff? The difficulty which first confronts us with respect to the plaintiff's right to have the issue raised by his traverse tried by a jury is that this is not an original action between the parties, but is supplemental proceeding on the execution, and is in the nature of a substitute for a creditors' bill at common law. Freem. Judgm., sec. 327. The issues and proceedings are informal, and the judge may order the witnesses before him, and hear the proofs, or he may refer the matters to a referee to hear and take the proofs, and report to the judge; and, so long as we have no statute prescribing any specific method of procedure, this proceeding affords a complete remedy, broad in its scope, and one of which neither party may justly complain, as its sole purpose is to bring the judgment debtor before the court or judge at chambers, for the purpose of inquiring into his business affairs, and to purge his conscience as to his ability, willingness or unwillingness to pay his debts. It is true that it is a summary and effectual one, but it is an inexpensive and speedy remedy in its nature, and so it must necessarily be, for the reason that the right of exemption is purely statutory, and in the nature of an action in rem. And we have no statute prescribing a method of inquiry into the conscience of the execution debtor when his property is taken under garnishment proceedings, or as to his ability or willingness to pay, or as to how much of the property so garnished is necessary for the support of himself or his family, and by this proceeding the court is enabled to so do, and to reach the res. McCullough v. Clark, 41 Cal. 298; Adams v. Hackett, 7 Cal. 187; Freem. Ex'ns, secs. 392-395, and authorities there cited. We therefore hold that the court below did not err in refusing plaintiff's demand for a jury trial.

4. The last question for consideration here is, did the court err in finding that the money garnished was necessary

EXEMPTION law,
1887: statutory
construction.

for the support of the defendant or his family during the time specified? The defendant, Brooks, filed his affidavit on October 2, 1896, in which he stated that he was a resident of the territory, the head of a family consisting of himself, his wife, and two children, who were dependent upon him and his earnings for support, that the money garnished was his personal earnings for the months of April and May, 1896, and was necessary to the support of himself and his family. These facts were traversed by the plaintiff, and upon the issues so joined the court set the matter down for hearing at chambers, without a jury, over the objections of the plaintiff. The statute under which the defendant claimed his right of exemption is as follows, to wit: "Sec. 6. The personal earnings of the debtor, and the personal earnings of his or her minor child or children, for three months, when it is made to appear by affidavit of the debtor, or otherwise, that such earnings are necessary to the support of such debtor, or of his or her family, and such period of three months shall date from the time of issuing any attachment or other process, the rendition of any judgment, or the making of any order, under which any attempt may be made to subject such earnings to the payment of a debt." Laws 1887, p. 73. The question presented for determination in the district court under this statute is this: Was the money garnished necessary to the support of the defendant or his family? The court heard the testimony orally, and the plaintiff called the defendant, Brooks, who testified that he was a resident of the territory, and the head of a family consisting of himself, his wife, and two children, and that the money garnished was his personal earnings as salary due him from the garnishee as live stock agent of the garnishee railroad company for the months of April and May, 1896, and that such earnings were necessary for the support of himself and his family, during that time. He also testified that he was earning during those months \$200 per month from the garnishee railroad company, and \$100 per month as assistant general manager of the Aztec Land & Cattle Company, Lim-

ited, and \$16.65 per month as secretary of the Western Union Cattle, Land & Irrigation Company, and \$40 per month as manager of Grant Bros.' cattle business, and \$125 per month as assignee of the Caulkins Cattle Company; making his personal earnings per month for the months of April and May, 1896, \$481.65. He also testified that his children consisted of two sons, at that time nineteen and seventeen years, respectively, and that the eldest was earning a salary of \$50 per month; thus making the total personal earnings of defendant and his son during the two months in question \$531.65 per month. It further appears from defendant's testimony that these salaries had been earned for some months prior to and subsequent to the said months of April and May, but it is not shown that each of said salaries was paid promptly at the end of each month, but it is not denied that any of them were not paid within a reasonable time thereafter; and that he lived in a house then belonging to his wife. The defendant also testified that these earnings during this time were necessary to the support of himself and his family dependent upon him in the style and mode of living to which he and his family had been accustomed, and that the expenses for the support of himself and his family for any given year were about \$3,600. The court found that the money garnished was necessary to the support of the defendant, Brooks, and his family and ordered that it be paid by the clerk of the court to the defendant. We are of the opinion that the court below erred in finding that the money so garnished was exempt under the statute, because it appears from the defendant's own testimony that his expenses for himself and his family for any given year were about \$2,000 less than his own personal earnings, besides the \$600 per year the personal earnings of one of his sons. We do not think the facts disclosed by this record warrant the finding of the district court. The legislature, in conformity with public policy now generally prevalent, enacted the exempting statute to encourage the formation of the family relation by conferring upon the heads of household privileges to protect their families against want in the event of misfortune, but it

was never intended that these generous provisions should be prostituted to the encouragement of extravagance, and the evasion of just indebtedness by indulgence in luxurious living. The statute exempts the personal earnings of the debtor entitled to its benefits to the amount necessary for the support of his family, and courts in administering the law should take into due consideration the facts and circumstances of each case. An allowance ample for a household of simple and moderate habits would be adequate for one accustomed to abundance; and it would be not less harsh to deny to the latter means commensurate with their reasonable necessities than to fail to accord to the former a liberal proportion of his earnings. In the case at bar it is manifest from the facts in the record that the defendant was earning at the time under consideration about \$2,000 per year more than the sum required and necessary for the support of himself and his family. It is a matter of common knowledge that \$3,600 is more than ample and sufficient to support any average family in comfort and ease. The judgment of the lower court is reversed, and remanded, with costs of this proceeding against the defendant, with directions to the court below to direct the clerk to pay to the plaintiff in error, the New Mexico National Bank, the \$400 now in his hands, less the costs of the garnishment proceedings.

Smith, C. J., and Collier, and Bantz, JJ, concur.

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[No. 740. August 25, 1897.]

IN RE ROE CHUNG, Petitioner. Prohibition.

PHYSICIANS AND SURGEONS—IMPRISONMENT FOR DEBT—ACT FEBRUARY 27, 1895—CONSTRUCTION.—There is no inconsistency between section 8 of the act of February 27, 1895, prescribing a penalty for practicing medicine or surgery in this territory without a certificate from the board of health, and section 9 of the same act, providing for imprisonment for failure to pay the penalty; that act is simply a valid exercise of the police power of the territory.

ID.—IMPRISONMENT FOR DEBT—JUSTICES OF THE PEACE—JURISDICTION. Section 2321 of the act of 1876, limiting imprisonment to thirty days, was repealed by the act of 1889, providing that all fines and costs of imprisonment may be suffered at the rate of one dollar per day until the days amount to the fine and costs, by which jurisdiction was conferred on justices of the peace to sentence for a longer period.

ID.—WRIT OF PROHIBITION—DISMISSAL.—Where judgment was regularly rendered, but not formerly entered, before notice of writ of prohibition, the application for the writ might have been dismissed on that ground.

Application of Roe Chung, for a writ of prohibition, to H. H. Ribble, a justice of the peace for precinct No. 26, Bernalillo County. Writ denied.

The facts are stated in the opinion of the court.

HORTON MOORE for petitioner.

The law under which the actions complained of in the petition, sections 7, 8, 9, act February 27, 1895, is contradictory, inconsistent and unconstitutional. *State v. Barlow*, 91 N. C. 550; Const. U. S. Amend., art. 8; Comp. Laws 1884, sec. 2594.

The court of the justice of the peace has no jurisdiction to try and determine said causes. 12 Am. and Eng. Ency. of Law 247; Succession of Weigle, 17 La. Ann. 70; *Hopkins v. Comm.*, 3 Metc. (Mass.) 462. See, also, 19 Am. and Eng. Ency. of Law 268; *Atkins v. Siddons*, 66 Ala. 453; *Russell v.*

Jacoway, 33 Ark. 191; *Ex parte Green*, 29 Ala. 52; *Ex parte Little Rock*, 26 Ark. 52; *People v. Superior Court*, 47 Colo. 81; *Clark v. Superior Court*, 55 Cal. 199; *Wruden v. Superior Court*, Id. 504; *Arnold v. Shield*, 5 Dana (Ky.) 394; *People v. McAdam*, 58 How., Pr. (N. Y.) 278; *Kellogg v. Superior Court*, 56 Cal. 231, 241; *Quimbo v. People*, 20 N. Y. 531; *State v. Ridgell*, 2 Bail. S. C. 560; 19 Am. and Eng. Ency. of Law 269.

R. W. D. BRYAN and S. BURKHART for respondent.

Justice of the peace have jurisdiction to hear and determine such causes as those in question. Comp. Laws 1884, sec. 2321; Act Feb. 27, 1895; *State v. Judge of Sup. Dist. Court*, 29 La. Ann. 360; *Morris v. Lenox*, 8 Mo. 252; *People v. Seward*, 7 Wend. 518; *People v. Court of Com. Pleas*, 43 Barb. 278.

The laws regulating the practice of medicine and inflicting punishment for violation of their provisions are on the statute books of nearly all the states. The constitutionality of those laws has been recognized by many decisions of the courts of last resort. In nearly every state, the highest court has, in express terms, held such acts valid. *Dent v. West Va.*, 129 U. S. 114; *Eastman v. State*, 109 Ind. 278; *People v. Pippin*, 37 N. W. Rep. (Mich.) 888; *Williams v. People*, 121 Ill. 84; *People v. Blue Mountain Joe*, 21 N. E. Rep. (Ill.) 923; *Weideman v. State*, 56 N. W. Rep. (Minn.) 688; *Butler v. Chambers*, 30 Id. 308; *Staley v. Thompson*, 46 Id. 410; *State v. Marshall*, 15 Atl. Rep. (N. H.) 210; *People v. Avensberg*, 11 N. E. Rep. (N. Y.) 277; *Powell v. Comm.*, 127 U. S. 678. See, also, *Wisconsin v. Insurance Co.*, 127 U. S. 265; *Huntington v. Altril*, 146 Id. 657; *Comm. v. Kerr*, 32 Atl. Rep. (Pa.) 276; 3 Black. Com. 415; Rev. Stat., U. S., secs. 990, 410; Kearny's Code; Laws 1884, pp. 105, 112, 115; Laws 1884, sec. 1968; *State v. Easley*, 10 Ia. 149; *State v. Conlin*, 27 Vt. 318; 11 Am. and Eng. Ency. of Law, 760; *State v. Leis*, 11 Ia. 416; *Garray v. Comm.*, 74 Mass. (8 Gray) 382; *Tuttle v. Comm.*, 68 Id. (2 Gray) 505; *Norton v. State*, 65 Miss. 297; *State v.*

Small, 64 N. H. 491; Comm. v. Welsh, 2 Va. Cas. 57; Bish., Stat. Crime, sec. 240; 11 Am. and Eng. Ency. of Law 760; Hawkins' Pleas of Crown., 72 Jacob's Law Dic. "Convict;" People v. Butler, 3 Cow. (N. Y.) 347; Bish., Crim. Law, sec. 960; State v. Volmer, 6 Kan. 379; Ex parte Fassett, 142 U. S. 479.

COLLIER, J.—The application for a writ of prohibition was made in vacation to the Honorable H. B. Hamilton, one of the justices of this court, under section 2006 of the Compiled Laws of New Mexico 1884, who, instead of granting the writ, and making it returnable to the next regular term of this court, ordered a rule to issue to respondent, H. H. Ribble, justice of the peace, for him to show cause at the beginning of this term, why such application should not be granted. This court decided to treat this application as if it were made to the court in term time, and accordingly the matter is before us on the application and the answer. Without setting out at large the averments in either, we will consider the following questions raised by the counsel for petitioner and respondent: (1) Assuming the act of the legislative assembly of New Mexico, "to regulate the practice of medicine," etc., approved February 27, 1895, to be a rightful subject of legislation, can the penalties prescribed be legally enforced? (2) Has a justice of the peace court jurisdiction in an action to recover the penalty for a first offense? (3) Does it appear that the causes, the trial of which is sought to be prohibited, relate to subsequent offenses? While some attack is made upon this class of legislation as invalid, it is so well established that it is not only a rightful, but a most frequent, subject of legislation, that we have concluded, despite such attack to assume this much, and content ourselves with an extract from the decision of Williams v. People, 121 Ill. 87, 11 N. E. Rep. 884, as follows: "It is the common exercise of legislative power to prescribe regulations for securing the admission of qualified persons to professions and callings demanding special skill, and nowhere is this undoubtedly valid exercise of

the police power of the state more wise and salutary, and more imperiously called for, than in the case of the practice of medicine. It concerns the preservation of the health and the lives of the people." Our statute is very liberal in respect to the requirements for obtaining a certificate legally authorizing the holder to practice medicine in this territory, graduation and diploma not being necessary if examination satisfactory to the board of health be passed, a provision more liberal, perhaps, than should be in a matter so vital to the interests of the public, to whom such a certificate accredits the holder. This seems quite a relaxation of the rule much more stringent in some other jurisdictions. It is objected by counsel for petitioner that there is a provision requiring the recovery of a penalty in an action of debt, which is converted into a fine in

IMPRISONMENT
for debt: act
Feb. 27, 1895:
construction.

proceedings to enforce its collection. In other words, they say that a civil action eventuates in a judgment in a criminal case. The reply to all this, or at least one of the replies, is that such a statute comes under the police power of the state, and it is frequently the case that imprisonment is embraced as a part of the judgment. The most familiar illustration of this occurs in the enforcement of fines imposed for a violation of municipal ordinances. Thus, under the head of "Municipal Corporations" (section 1625, Comp. Laws 1884), we find that all actions to recover a fine or penalty under any ordinance shall be brought in the name of the city or town as plaintiff; that (section 1627) the first process shall be a summons, special provision being made for it being begun; otherwise, if a fine is imposed, order may be made for commitment until the fine and costs are paid. Scarcely any one disputes the validity of such an ordinance, and it is certain that a proceeding begun by a city as plaintiff is not criminal, but at most only quasi criminal. It is stated by Justice Harlan in the case of *Railway Co. v. Humes*, 115 U. S. 512, "that the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced—whether at the suit of a

private party or at the suit of the public, and what disposition shall be made of the amounts collected—are merely matters of legislative discretion.” In the face of this authority the question is reduced merely to a consideration of the legality of the imprisonment clause as a means of enforcing the fine recovered. About this we entertain no doubt. An action of debt with the territory as a party suing for the use of the board of health is fully as much an effort to enforce a law quasi criminal as is an action by a municipality as plaintiff, imprisonment being the means of enforcing judgment against all offenders. Both actions are for the enforcement of the police regulations of the territory, and fines are not a debt in the sense that there is no imprisonment therefor. *Powell v. Pennsylvania*, 127 U. S. 678; *Hardenbrook v. Town of Ligonier*, 95 Ind. 70; *Charleston City v. Oliver*, 16 S. C. 47; *Ex parte Hollwedell*, 74 Mo. 395; *Ex parte Reed*, 4 Cranch, C. C. 582. It is our view, therefore, that there is no inconsistency between recovery and enforcement of the fine which prevents, in any sense, their standing legally together.

The second question we have proposed to consider is, is there jurisdiction in the justice to proceed? The statute provides that any person practicing medicine or surgery without a required certificate “shall for each and every instance of such practice forfeit and pay to the territory of New Mexico the sum of one hundred dollars for the first offense and two hundred dollars for each subsequent offense, the same to be recovered in an action of debt before any court of competent jurisdiction.” It is not disputed that a justice of the peace court has jurisdiction in an action for the recovery of \$100 or less; but counsel say that a justice of the peace can not sentence for a longer period than thirty days, and, therefore, it not being jurisdictional to enforce the fine by imprisonment the required length of time, this ousts all jurisdiction to proceed in the first instance. The only authority counsel have is that a statute enacted in 1876, and found in the *Compiled Laws* in section 2321, thus limits the imprisonment. It is

IMPRISONMENT
for debt: justices
of peace: juris-
diction.

sufficient to say that, if this argument prevailed, the law they cite should be held irrepealable. The statute of 1889 (page 12)—a later statute—says that for all fines and costs imprisonment may be suffered at the rate of one dollar per day until the days amount to the fine and costs. It is only liberal and just that the act of 1889 should be read into the act of 1895, as we believe must have been the intention of the legislature.

This brings us to the last inquiry we have proposed to ourselves, viz., do the causes whose trial is sought to be prohibited relate to subsequent offenses? If they do affirmatively appear to be suits or prosecutions for subsequent offenses, it is

WRIT of prohibi-
tion: dismissal.

contended that nevertheless the plaintiff could waive demanding more than the amount recoverable for a first offense. Remission of a part of a claim simply to obtain jurisdiction, and without consent of a debtor, is generally held not to be allowable, though there are authorities both ways upon this question. We see no necessity for determining this question, however, as our conclusion depends upon other grounds. These proceedings were within the jurisdiction of the court, so far as appears on the face of the record. The actions sought to be prohibited were yet undetermined, or they were already determined. If they were determined before notice of the writ of prohibition, there is, of course, an end of this case. If they were not determined, then upon the trial the petitioner would have a complete remedy at law by showing by evidence that they were subsequent offenses, if in fact they were. It is our view, however, that the answer of the respondent shows that judgment had been regularly rendered, but not formally entered, in this cause, before notice of the writ of prohibition, and this application might have been dismissed on that ground. As, however, the question seemed one of public importance, we preferred to give these views. The application for the writ of prohibition will be denied, and it is so ordered.

Smith, C. J., and Laughlin, Hamilton and Bantz, JJ.,
concur.

[No. 738. August 25, 1897.]

HORSE SPRINGS CATTLE COMPANY, Appellant, v.
JOHN W. SCHOFIELD, Appellee.

JUDICIAL SALE—MOTION TO SET ASIDE—FINDINGS OF CHANCELLOR.

Held: While weight should be given to the findings of the chancellor, yet where, as here, on a motion to set aside a judicial sale, the proofs tended to establish the grounds alleged in the motion, or some of them, and no testimony was produced to the contrary, the chancellor could not disregard such proofs, except so far as they might be discredited in themselves or by other testimony.

Id.—MATERIAL ERRORS—UNCONSCIONABLE ADVANTAGE.—Held: That

where, as here, a judicial sale of property is based upon material errors, which, if allowed to stand, would result in permitting the purchaser to enjoy an "unconscionable advantage," by the sacrifice of the property through such errors, the sale will be set aside. *Blackburn v. Railroad Co.*, 3 Fed. Rep. 689.

Appeal, from an order denying a motion to set aside an order authorizing the receiver of defendant company to sell certain property of defendant, from the Second Judicial District Court, Bernalillo County. Reversed and remanded, with directions.

The facts are stated in the opinion of the court.

WARREN, FERGUSON & GILLET for appellant.

If this court is satisfied, from the uncontradicted evidence in this cause that the form, manner or terms of the sale of January 16, 1896, were such in consequence of there not being required any public notice or competition, or any opportunity given to any one but Hayes to purchase the cattle, then the court should reverse this cause, wholly independent of any question of fraud, express or implied. *Schroeder v. Young*, 161 U. S. 334; *Graffan v. Burgess*, 117 Id. 180. See, also, *Smith on Receivers* 89; *High on Receivers*, sec. 191, et seq.; *Brittin v. Handy*, 73 Am. Dec. 491, note.

CHILDERS & DOBSON for appellees.

BANTZ, J.—In a proceeding to foreclose a mortgage upon certain cattle and real estate of the Horse Springs Cattle Company one George Smith, its president, was appointed receiver, on the stipulation of the parties. This stipulation, which was signed by Smith for the company, authorized the receiver to round up such cattle as could be marketed, and dispose of them at public or private sale; the contract for the sale of such cattle to be first submitted to the court for approval, or to receive the written assent of Schofield, representing the mortgagee. Under that stipulation, an order of court was made March 28, 1894, authorizing Smith, as receiver to gather the cattle, and contract for the sale of the mortgaged property “to the best advantage;” such contracts to be submitted to the court for approval, unless assented to in writing by Schofield. Acting under this order, a number of cattle were gathered from time to time, and sold by the receiver. On January 16, 1896, the receiver, Smith, made an application for leave to sell the remainder of the cattle then on the range for \$7,000, range delivery. In this application the receiver represented that it would be to the interest of all parties to accept the offer of \$7,000 which he had received; that it was impossible to state how many cattle there were, but he did not believe there were one thousand head; that a sale upon the range would save considerable expense; and that he had submitted the proposition to complainant, Schofield, who was willing it should be accepted. On the same day an order of court was made reciting that the cause came on to be heard on this petition of the receiver, and that complainant, by his solicitor, appeared, and consented to it. The receiver was authorized to accept the offer, and report his doings to the court. On April 4, 1896, a motion was filed by the Horse Springs Cattle Company, praying the court to set aside the order authorizing Smith to make the sale for \$7,000, upon the following grounds: 1. Said order was improvidently made, and without notice to or knowledge of the defendant, the Horse Springs

Cattle Company, or the attorneys, solicitors, officers, directors, or stockholders thereof. 2. There was at the date of said petition and order a much greater number than one thousand head of cattle belonging to defendant, the Horse Springs Cattle Company, and branded "Z. P.," in the charge of said receiver, upon the lands or ranches of said defendant company.

3. The amount of \$7,000, alleged to have been offered to said receiver for said Z. P. cattle, is a wholly inadequate and insufficient price for the same, and said cattle could have been, and can now be, readily sold for a much greater sum in cash than \$7,000.

At the time this motion was filed, no report had been made by the receiver as to his action under the order, but in a report which appears to have been sworn to on April 20, 1896, the receiver reports that on January 17 he sold the cattle to one H. A. Hayes for \$7,000, cash, had received payment therefor, and had paid over the purchase money to Schofield on the mortgage debt.

On October 27, 1896, the court required the company to give bond in the sum of \$15,000, conditioned that in the event the sale should be vacated the cattle shall realize on resale such sum in addition to \$7,000, as will be sufficient to pay costs of resale and costs of receivership from January 16, 1896. The cause was referred to an examiner, to take proofs as to the number and value of the cattle, and all material facts in regard to the sale. The examiner took a large mass of testimony, and on June 7, 1897, the court heard the case on the testimony so taken, and found that defendant had failed to establish any of the grounds set forth in its motion, and the motion was overruled. Final decree has been entered. The question was brought here on appeal.

The testimony upon this motion was taken by an examiner, so that on appeal this court acts on the same information possessed by the court below. Oral testimony was not usually delivered by the witnesses before the chancellor, and hence the rule that on appeal the whole case on the law and the facts is considered, and, so far as it is essential to a proper

JUDICIAL sale:
motion to set
aside: findings
of chancellor:
evidence.

decision, an examination of the evidence will be made. 2 Fost. Fed. Prac. 8474; In re Neagle, 135 U. S. 42. It is undoubtedly true that weight should be given to the findings of the chancellor, coming, as they do, on appeal, clothed with the presumption of correctness in their favor, and that mere differences of opinion upon doubtful questions of preponderance of evidence would not justify us in overturning them. Loring v. Atterbury (Mo. Sup.), 39 S. W. 773; Richardson v. Payne (Ky.) 30 S. W. 879. We are not required to determine in this case how far an appellate court will review findings in such cases. In this case the proofs tended to establish the grounds alleged in motion, or some of them, and no testimony was produced to the contrary. These proofs the court below was not at liberty to disregard, except so far as they were discredited in themselves or by other testimony. The appellant introduced some six witnesses, who were more or less familiar with the company's cattle upon the range, and who estimated the number at from one thousand three hundred to two thousand head. The valuation put upon these cattle was about \$10.25 on board of cars at Magdalena, at a cost of less than \$1 per head. Some of this testimony as to number and value was not entitled to much weight, but some of it was given by credible witnesses, qualified to estimate the number and testify to value and such testimony was not incompetent. It was the best and only way, under the circumstances, by which the court could ascertain the truth. The receiver, Smith, merely estimated the number in his report, and says that it was "impossible for him to state how many cattle remain on said ranch," but did not "believe" there were more than one thousand head. It was upon that representation by the receiver, and upon the representation as to the best price obtainable (about \$7 per head), that the court authorized the sale. We think that the evidence shows that the receiver, Smith, unduly underestimated the number of these cattle, and that to allow this sale to stand for \$7,000, would result in a loss to the mortgagor of at least \$7,000, if not a much larger.

sum. It was argued in favor of the purchaser that it was the duty of appellant to be vigilant, and, after vesting discretion in the receiver by the stipulation of March 24, 1894, to sell at private sale, complaint could not be heard now. But, even though the parties and the court had given the receiver the widest latitude of discretion, if the court should become advised that, either from mistake or other cause, the receiver was disposing of the property at a sacrifice, it would become the duty to stay his hand. The stipulation, however, directs Smith to "round up such cattle as can be marketed," and these were the cattle he was authorized to dispose of at private sale, cattle of a definite number, actually gathered. It did not authorize him to sell at private sale all of the company's cattle, unnumbered and scattered over the range; and it may not be unfair to assume that appellant trusted to the stipulation as the limit of its consent. We do not, however, regard the stipulation as the material thing, the important thing being that, if the receiver was abusing his authority, it was the duty of the court to interpose. This duty did not depend upon proof of corruption or bad faith, but, even though the receiver acted by mistake of fact, it would be equally the duty of the court to protect the estate which it was administering. The receiver was trustee for all parties in interest. It was his duty to see that the property realized the highest sum, and it was the duty of the court to see that he did. *McGown v. Sandford*, 9 Paige 290; *Brown v. Frost*, 10 Paige 243. There is a clear distinction between sales made under execution and sales in a proper sense called "judicial," made under decrees in chancery. In the latter case the court, in a measure, is the vendor. *Anderson v. Foulke*, 2 Har. & G. 355. In such cases the court decreeing the sale has greater power over it, and the grounds of interference are not so strict. *Daniel*, Ch. Prac. 1285. This was carried so far that formerly in England the court would open the bidding upon a ten per cent increase over the bid of the purchaser. This practice has not, however, been approved in this country, and it is perhaps well settled that

JUDICIAL sale:
material errors:
unconscionable
advantage.

mere inadequacy in price at public sales where the parties are adults will not be sufficient to deprive the purchaser of the fruits of his bargain. In *Blackburn v. Railroad Co.*, 3 Fed. 689, the court say: "The best solution of the subject seems to be to hold closely to the public policy which protects the sales against instability, by refusing to set them aside unless the price offered in advance is so great in proportion to the bid already made that it affords substantial evidence that for some perhaps unknown reason the property has been greatly undersold; so much so that the purchaser has not simply a bargain with a fair margin of profit, but an unconscionable advantage of the parties for whose benefit the sale has been made." In *Williamson v. Dale*, 3 Johns. Ch. 292, where the mortgagor had been innocently misled by the mortgagee as to the time of sale, Chancellor Kent ordered a resale, observing: "There is no imputation of any unfair intention of the plaintiff or his solicitor, or of any unfair conduct at the sale (public); but I think that, under the circumstances, the defendants were innocently misled, without any culpable negligence to them." See, also, *McGown v. Sandford*, 9 Paige 290; *Brown v. Frost*, 10 Paige 243. In *Anderson v. Foulke*, 2 Har. & G. 356, Chancellor Bland, after alluding to the English rule in holding that it did not obtain in Maryland, says: "But in this state, as well as in England, if there should be made to appear, either before or after the sale has been ratified, any injurious mistake, misrepresentation or fraud, the bidding will be opened, the reported sale will be rejected, or the order of ratification will be rescinded, and the property again sent into the market and resold." In *Deford v. Macwatty* (Md.) 33 Atl. 488, the court says: "The mistake or surprise or omission of duty or misconduct or fraud, such as will justify the interference of the court, will depend upon the particular circumstances, and, in dealing with all such questions, it must be borne in mind that sales of this kind are made by the court, through the receiver, as its agent, and made in behalf of the interests of all parties concerned;" and where, through some mistake, the

sale would, if consummated, result in serious sacrifice of the property, it will set the sale aside and order the property resold. *Graffam v. Burgess*, 117 U. S. 180, and *Schroeder v. Young*, 161 U. S. 337, were cases where the property had been sold at public sale on execution, and the question arose in new and distinct proceedings. In *Graffam v. Burgess* the general proposition is laid down that if, in addition to inadequacy of price, there be other circumstances throwing a shadow upon the fairness of the transaction, the courts will seize upon them to declare the sale invalid. In *Schroeder v. Young*, the court say: "While mere inadequacy of price has rarely been held sufficient, in itself, to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it, especially if the inadequacy is so gross as to shock the conscience."

We are of the opinion that the evidence shows that the order authorizing the receiver to sell these cattle was based upon great and material errors as to the number of cattle and to the reasonable value thereof, and that to refuse to set the sale aside would result in permitting the purchaser to enjoy "an unconscionable advantage" by the sacrifice of the property through such mistake. When Mr. Hayes bid upon this property, he submitted himself to the jurisdiction of the court as to all matters connected with the sale, and relating to him in the character of purchaser. *Requa v. Rea*, 2 Paige 339; *Kneeland v. Trust Co.*, 136 U. S. 93. A resale should be granted, but out of the purchase money received from the sale the former purchaser, Hayes, shall be repaid the purchase price heretofore paid by him and interest thereon at six per cent per annum from the seventeenth day of January, 1896, and also his reasonable costs and expenses of defending the sale heretofore made to him, including his solicitor's fees in this and the court below. *Williamson v. Dale*, 3 Johns. Ch. 293; *Duncan v. Dodd*, 2 Paige 101. These costs and expenses will be ascertained and taxed by the court or judge of the Second

judicial district. The cause is therefore reversed and remanded, to be proceeded with in accordance with this opinion.

Smith, C. J., and Laughlin, J., concur.

[No. 726. October 2, 1897.]

GEORGE W. WITT et al., Appellees, v. C. CUENOD
et al., Appellants.

DECREE—MASTER'S REPORT—OVERRULING CONCLUSIONS OF LAW—PRESUMPTION—FINDING OF FACT—SUFFICIENCY.—Where the decree expressly overrules the master's conclusions of law, it must be taken, by fair implication, as an approval of his findings of fact, and, in the absence of anything in the findings of fact against the correctness of the decree, it must be sustained.

Appeal, from a decree for complainants, from the Fifth Judicial District Court, Eddy County. Affirmed with directions.

The facts are stated in the opinion of the court.

A. A. FREEMAN and J. O. CAMERON for appellants.

When the parties of their own accord withdraw a cause from the court, and refer it to a tribunal of their own selection, the finding of such tribunal is conclusive as to the facts found, subject alone to impeachment for fraud or to be set aside on account of entire absence of proof. *Wiscort v. Dauchy*, 3 Dal. 321; *Davis v. Schwartz*, 155 U. S. 636; 9 Wall. 125.

JOHN FRANKLIN and U. S. BATEMAN for appellees.

COLLIER, J.—Appellees, under the firm name of Witt Brothers, brought in the district court of Eddy county their bill for foreclosure of a chattel mortgage against appellants as partners doing business under the firm name of L. Ramnez & Co. In addition to an answer, to which replication was filed, appellants filed their cross bill praying for a rescission of

the contract upon which the note and mortgage were founded, and for said note and mortgage to be delivered up for cancellation. The cause was referred to an examiner to take the proofs, and report the same to the court. After the testimony taken was filed, an order was made referring the proofs to a special master to report his findings of fact and conclusions of law thereon. The master reported, recommending that the contract be rescinded, and the note and mortgage delivered up for cancellation. Exceptions were filed by appellees, and the chancellor sustained same, finding that the master's conclusions of law were erroneous. Decree was thereupon rendered in favor of appellees for the full amount of the note and interest, for solicitor's fees, and for expense in and about the caring for the property covered by the decree of foreclosure. From this decree an appeal is taken. The transcript of the record contains the pleadings, orders, report of master, and decree, but not the proofs taken in the case; the appellants contending that, if more is needed to a proper review of the case, it was the option of the appellants to bring it here. Appellees requested that certiorari issue from this court at the cost of appellants, but, solicitor for appellants resisting, this was denied, and the cause was argued without the testimony upon which the report of the master purported to be based. After the submission of the cause to the court, appellants' solicitor produced in court the original of the report made by the examiner, but it was declined, and ordered to be returned to the custody of the clerk of the district court held in and for the county of Eddy.

It was a matter of some discussion upon the argument as to whose duty it was to produce here the proofs which had been taken by the special examiner; the solicitor for appellants contending that, though the report of the special master was assailed by exceptions regularly filed, and for a proper determination of those exceptions it was necessary for the chancellor to peruse said testimony, yet the case could be properly reviewed here in the absence of such proofs.

MASTER'S report:
decree overruling
conclusions of
law: presumption:
finding of
fact: sufficiency.

This we think an untenable position, and to illustrate how it might be that two opposite conclusions, both correct, could be reached in the same case, if the contention were followed, we will suppose an exception to a finding of fact by the master, and the chancellor, discovering there was no evidence to support such finding, decrees to the contrary of the master's recommendation. Afterwards the case comes here on review without the evidence, and, if there obtains a presumption, as appellants contend, in favor of the correctness of the master's finding of fact, a reversal of the chancellor would necessarily follow. Admitting for the moment that there is such presumption, yet such a result we do not think should be deduced from the privilege afforded to appellants and plaintiffs in error by the act of 1889 entitled "An act with reference to practice in the supreme court and for other purposes." Laws 1889, chap. 1. The option granted of taking up only such part of the record as appellant or plaintiff in error deems "necessary for a review of the judgment or decree," instead of the whole record, was intended to lighten the burden of expenses, but not in any way to put the opposite party to any disadvantage, or change his position in any respect. Under the act of 1889, just as formerly, the appellant or plaintiff in error should have his case in this court, with nothing to be desired for a full and proper determination of the question of error or want of error in the lower court. Error is alleged in the lower court, and it must be affirmatively shown to procure a reversal. This can not be done where the contention respects a matter of fact which can not be discerned from the record in this court. If the record were here presuming the absence of nothing necessary for a determination by the lower court, it would be taken as all the record necessary to a proper review, unless the appellee or defendant in error asked for the production of something more. Also we will say that we do not think any such presumption attaches to the findings of a master, as solicitor for appellants asserts. This assertion is that, after a master's findings have been successfully assailed according to the

forms of law, and decree entered setting them aside, they are presumed to be correct. This position, if true, overcomes the presumption of correctness of the conclusion of a tribunal, of which the master is merely a subordinate officer. It is laid down in *Kimberly v. Arms*, 129 U. S. 512, and the principle is affirmed in *Davis v. Schwartz*, 155 U. S. 631, that "Its [the tribunal of the master] findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of court, when there has been manifest error in the consideration given to the evidence, or in the application of the law; but not otherwise." If the court to which report has been made sets aside the findings, the presumption should obtain that there was a proper decree within the limits of review. We state this to be the rule in a reference of the broadest character without meaning to say that there was such a reference in this case. While the terms of the reference in this case are broad, yet we do not think they should be so construed. An examiner took the proofs, and they, instead of being submitted to the court, were referred to a master, who had nothing more before him than the chancellor had, or than this court would have had if the appellants, as they should have done, had brought the proofs here. Under these circumstances the findings of fact should not be taken as more than advisory, a sort of responsible summary to be accepted as correct unless assailed, in which event the chancellor should read the dry transcript for himself.

In this case it appears that the decree expressly overrules the master's conclusions of law, and this should be taken by fair implication to be an approval of his findings of fact. If the decree had been general in form, there would be nothing here for us to consider, as it is not contended that the pleadings do not authorize the decree. We will look, therefore, to the master's findings of fact, to see whether or not there should have been a decree for appellees. The theory of the decree appears to be that a "verbal promise made by the complainants prior to the time of the execution of said mortgage"

is not "a good defense to this suit." This verbal promise was, as we gather from the report, that the appellees agreed, and it was the main inducement to the trade, that in consideration of the purchase by appellants of the cows, horses, and implements used in running the dairy business carried on by appellees in the town of Eddy, the appellees would cease to carry on such business in said town. The fact is also found that they continued, notwithstanding such promise, to carry on such business in said town, and that appellants promptly returned the property purchased to appellees, notifying them of a rescission of the contract because of their "engaging in the dairy business in the town of Eddy." The chancellor held, in effect, that the contract was not rescindable because of this representation of appellees. The general principle laid down in *Delaine Co. v. James*, 94 U. S. 207, is that "canceling an executed contract is an exertion of the most extraordinary power of a court of equity, and the power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them." There is no finding of fact directly upon the question of injury to the appellants, and it would appear, therefore, that one of the elements for a case of rescission has not been made out. We, however, do not put our conclusion on so narrow a ground. The representations in this case were not as to any matter in *praesenti*, but related only to the performance of a promise in the future; and there is no specific finding that the promise was deceitfully or fraudulently made with no intention at the time of performing it. The master does, in his citation of authority for his conclusions of law, speak of "a sale effected by deception," and "representations and promises which are fraudulent;" but this is the argumentative part of his report, and it hardly can be called a finding of fact sufficient to overcome the presumption of correctness of the decree, if in law even such result should follow. There is no authority that the research of counsel or ourselves has

produced going to the extent of holding that a promise of this kind, honestly made, but afterwards not performed, avoids a contract of sale. In *Railway Co. v. Titterington* (Tex. Sup.) 19 S. W. 472, it was held that where a railroad company promised, in consideration of the grant of right of way, that it would construct and maintain a station on the land granted, the deed could be canceled if the promise was made with intent to deceive, if there was no compliance, but not if there was noncompliance without such intent. That court says, however, in its opinion, that the authorities are variant on the former proposition. In other cases the Texas court announces the general principle to be that such a promise would not be ground for cancellation, but the party must resort to his action for damages. *Moore v. Cross*, 29 S. W. 1051, and *Meyer v. Swift*, 11 S. W. 378. To the same effect as this are the cases of *Tufts v. Weinfeld* (Wis.) 60 N. W. 992; *Store-Service Co. v. Conyngham* (Com. Pl.) 32 N. Y. Supp. 129; *Day v. Improvement Co.* (Ill. Sup.) 38 N. E. 567. The following cases seem to say the misrepresentation must be of a fact at the time or previously existing, and not a mere promise for the future, and this without respect to its being fraudulently or honestly made, to wit: *Fenwick v. Grimes*, 5 Cranch, C. C. 439, Fed. Cas. No. 4,733; *Long v. Woodman*, 58 Me. 49; *Burt v. Bowles*, 69 Ind. 1; while in Connecticut, Mississippi, Illinois, and perhaps other states, fraud at the time of making the representation is taken into account. It is unnecessary for us to determine which of the two lines support the better rule, as both agree that where there was no fraud at the time the sale is not rescindable; and there being no express findings that the misrepresentation was fraudulently made, "a trade intelligently made, where no fiduciary relation exists, will not be rescinded on the ground of fraudulent representations, except on clear and convincing proof." *Breemersch v. Linn* (Mich.), 59 N. W. 406. There being nothing in the findings of fact by implication approved by the chancellor to militate against the correctness of the decree of the lower court, it should be affirmed, and a decree will

accordingly be entered in this court directing the said district court to proceed in conformity herewith, with the costs of this appeal to be taxed in the court below against appellants; and after the sale of the property, if any deficiency arises, a decree therefor will be entered, together with said costs, against appellants and the sureties on their appeal bond; this case being hereby in all respects affirmed.

Smith, C. J., and Laughlin and Bantz, JJ., concur.

[No. 724. October 2, 1897.]

LINCOLN LUCKY & LEE MINING COMPANY, Plaintiff in Error, v. ALEXANDER M. HENDRY, Defendant in Error.

EJECTMENT—CONSOLIDATION OF SUITS—JUDICIAL DISCRETION.—The right of the courts of this territory to order the consolidation of causes, in their discretion, is indisputable, and the exercise of such discretion is not subject to reversal, except in cases of palpable abuse.

ID.—TITLE—OFFER TO PROVE AND FAILURE TO PRODUCE DOCUMENTS.—An offer to prove a chain of title is properly refused, where the party making the offer fails to produce the documents when asked to do so.

ID.—INSTRUCTIONS.—Where requests to charge the jury, submitted by defendant, were fully covered by the charge of the court, defendant could not complain.

ID.—OUSTER UPON AND UNDER SURFACE.—There is no distinction between an ouster upon the surface and an ouster under the surface of the earth, except in cases arising under the mining laws by virtue of section 2322, Rev. Stat. U. S.

ID.—ERROR—EVIDENCE—OMISSION FROM RECORD—PRESUMPTION.—Where a claim of error is based on a question of fact, the correctness or incorrectness of which can not be discerned from the record, the correctness of the judgment of the court below will be presumed. Witt v. Cuenod, 9 N. M. 143, ante.

Error, from a judgment for plaintiff, to the First Judicial District Court, Santa Fe County. Affirmed.

The facts are stated in the opinion of the court.

WARREN, FERGUSSON & GILLET for plaintiff in error.

The court below erred in making the order of consolidation. Even under section 921, Revised Statutes, separate actions can not be consolidated for any purpose, where the defenses differ, as here, unless by consent of parties. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285. See, also, *Cox Com. Law Prac.* 239, sec. 7; 2 *Arch. Prac.* 180; *Graff v. Musser*, 3 *Serg. & R.* 262; *Scott v. Cohen*, 1 *Nott. & M.* 413; *Bones v. National Bank*, 67 *Ga.* 339; *Smith v. Crabb*, 2 *Stra.* 1178; *Bayly v. Roby*, 1 *Id.* 420; *Reid v. Dodson*, 1 *Overt.* 396; *Wallace v. Eldridge*, 27 *Cal.* 498; *Merrill v. Lake*, 47 *Am. Dec.* 377; *Blasch v. Chicago*, 44 *Wis.* 593; *Ortman v. Ry. Co.*, 32 *Kas.* 419; *Bangs v. Dunn*, 66 *Cal.* 72; *Wilkinson v. Johnson*, 4 *Hill.* 745; *Howard v. Chamberlain*, 64 *Ga.* 684.

The court erred in excluding competent and material evidence offered by defendant, to his prejudice. The relative rights of the parties, as determined by the law governing possession without title, are materially different from those existing under the mining laws of the United States and of New Mexico. *Field v. Gray*, 25 *Pac. Rep.* 793; *Bay State Co. v. Brown*, 21 *Fed. Rep.* 167; *Dickenson v. Colgrove*, 100 U. S. 582; *Moorehouse v. Phelps*, 21 *How.* 294; *Reynolds v. Iron Silver*, 116 *How.* 687.

NEILL B. FIELD for defendant in error.

The order of consolidation was properly made. *Rev. Stat. U. S.*, sec. 921; *Mut. Life Ins. Co. v. Hillman*, 145 U. S. 285; *Folsom v. U. S.*, 7 *Gild. (N. M.)* 532; *Putnam v. Lyon*, 32 *Pac. Rep.* 492; *Russell v. Chicago, etc., Co.*, 29 *N. E. Rep.* 37; *Pelzer v. Ins. Co.*, 15 *S. E. Rep.* 562; *Grant v. Davis*, 31 *N. E. Rep.* 587; *Dem v. Kemble*, 9 *N. J. L.* 335;

Jackson v. Stiles, 5 Cow. 282; Keep v. Indianapolis, etc., Co., 10 Fed. Rep. 454; Railway v. Jones, 49 Id. 343; Powell v. Gray, 1 Ala. 77; 4 Ency. Pl. & Pr. 688, note 1.

The right to the possession of the surface of the earth carries with it the right to the possession of everything beneath the surface to the center of the earth. Rev. Stat., sec. 910; Mining Co. v. Mining Co., 11 Mar. Rep. 608; Pardee v. Murray, 2 Pac. Rep. 16; Iron Silver Co. v. Elgin Co., 118 U. S. 196; Bradley v. Lee, 38 Cal. 362; Mallett v. Min. Co., 1 Mar. Rep. 17; English v. Johnson, 12 Id. 202; Aurora Co. v. Min. Co., 15 Id. 581; Hicks v. Coleman, 25 Cal. 122; Hawes v. Min. Co., 160 U. S. 303.

COLLIER, J.—This was an action of ejectment, brought by the defendant in error against the plaintiff in error for the possession of a mining claim known as the "Anaconda Mine," situated in Santa Fe county, New Mexico, the facts in regard to which are sufficiently stated in the opinion. In the view that we take of this case, many questions which are pressed upon our attention in the briefs, and which were urged upon the oral argument, may, with entire justice to all parties, be left to be decided when they arise in a case where the determination is necessarily involved. One question of practice, however, should be passed upon, and that is whether or not there was error in the order of consolidation. It is insisted by plaintiff in error that the order of consolidation was prejudicial to it, and that such prejudice is affirmatively shown by the record, in that it appears that this plaintiff in error relied upon a defense entirely different from that relied on by the plaintiff in error, Middleton, in the other cases. We are, however, unable to discover any force in the contention, because we think priority of possession was the one question in both cases. We think the right of courts to order the consolidation of causes in this territory in their discretion can not be disputed, and that the exercise of such discretion is not subject to a reversal, except in cases of palpable

CONSOLIDATION
of suits: judicial
discretion.

abuse thereof. *Insurance Co. v. Hillmon*, 145 U. S. 285; 12 Sup. Ct. 909; *Keep v. Railway Co.*, 10 Fed. Rep. 454.

On the trial of this case the parties, by their respective counsel, entered into a stipulation in writing as to the truth of certain facts, which, if material and relevant, tended to show that the ground in controversy was within the exterior boundaries of what was known as the "Canon Del Agua Land Grant," a private land claim confirmed by the congress of the United States in 1866 to one Jose Serafin Ramirez and his heirs, for which a patent was issued by the United States on the first day of July, 1875; that before the rights of any of the parties to this suit attached, proceedings were begun in the district court, Santa Fe county, by the United States to cancel the said patent, and such course was had therein that the bill of complaint of the United States was dismissed. Upon appeal to this court the judgment of the district court was reversed, and a decree was entered by this court on the twenty-third day of January, 1888, that said patent and survey upon which it was based, "be, and the same are hereby respectively forever annulled and set aside, and held for naught for any and all purposes whatsoever." Subsequently the case was taken on appeal to the supreme court of the United States, when the decree of the court was affirmed on the fourteenth day of November, 1892. A resurvey of the grant known as the "Canon Del Agua Grant" was approved by the commissioners of the general land office on August 30, 1894, and on the sixteenth day of January, 1893, the commissioner of the general land office of the United States wrote an official letter to the surveyor general of the territory of New Mexico, in which he said, among other things: "No entries, filings, or locations of any description can be permitted upon the premises granted by congress or heretofore relinquished by the government to said Ramirez until the necessary resurvey has been made, has been accepted as correct by the land department, and become final under the rules as the basis of a new patent; and the lands found not to be included in the grant have been opened to disposition according to law." Defendant in error

objected to the admissibility of the patent and the trial court sustained the objection, saying: "I will sustain the objection made by the plaintiff (defendant in error) to the introduction of that testimony offered, and under the stipulation, and I will presume for this case only, and for the purposes of this case, that the land in question at the time of the location of the Anaconda and the Lee was public land, and subject to location as made or attempted to be made by the respective parties, and I will submit the issue to the jury on the right of possession and the matter of damages, whatever they may be. I think this will present, probably, a plainer issue to the jury than for them to consider anything else, and it will effectually dispose of the right of possession of the property at the time of the bringing of this suit in question." The effect of this ruling was to exclude from the consideration of the jury the patent issued by the United States, and all the stipulated facts, and to make the case turn entirely upon the question of priority of possession. Subsequently the court rejected, on objection by defendant in error, an offer by plaintiff in error "to prove a complete chain of title from the original grantee to the Lincoln-Lucky & Lee Mining Company," he, in fact, not producing same, although given opportunity so to do. We think it enough to say as to this that, if plaintiff in error desired to prove such a chain of title, it should have produced the instruments upon which it was based, and that the court properly rejected the offer to prove such title because of failure to produce the documents when asked so to do. If plaintiff in error had proved a complete chain of title from Jose Serafin Ramirez for the locus in quo, it would devolve upon us to decide whether or not the trial court erred in rejecting the patent and stipulated facts; but, inasmuch as there was no such evidence in the case, we decline to pass upon the effect of the patent or decree of cancellation of patent and survey, and shall proceed to examine the instructions of the court, as well as the instructions requested by plaintiff in error, to ascertain

TITLE: offer to prove and failure to produce documents.

whether or not error prejudicial to plaintiff in error was committed.

We will first examine the instructions asked by the plaintiff in error, and refused. Without attempting to set out in

detail in this opinion the requests to charge sub-

INSTRUCTIONS. mitted by plaintiff in error, we feel constrained

to say that we find no proposition contained in those requests which we consider sound, and applicable to the case, which is not fully covered by the charge of the court. Considered as a whole, the requests ask the court to charge the jury as to the rights of the respective parties under the mining laws of the United States, and, in so far as they correctly state the law, they are embraced in and fully covered by the charge of the court. The plaintiff in error claimed under the Lee location, made in 1892, and the defendant in error claimed under the Anaconda location in 1889, and the charge of the court fully and correctly explains to the jury the rights of the respective parties if the grant was, as was assumed by the court, public domain of the United States, mineral in character, and on the twenty-fifth day of May, 1889, subject to location under the mining laws of the United States and of the territory. Indeed, counsel for plaintiff in error on the oral argument distinctly disclaimed any claim of error in the charge if the mining laws of the United States and of this territory are applicable to this controversy. We hold that there was no prejudicial error in the charge, if the mining laws of the United States and of this territory do not apply, because, unless the plaintiff in error could justify its intrusion upon the possession of the defendant in error under these mining laws, it could not be justified at all, and the court should have directed a verdict for defendant in error. In this aspect of the case the material facts are undisputed. Defendant in error

was in possession of the locus in quo on the sur-
OUSTER upon and face of the earth, and the boundaries on the
under surface. surface were sufficiently marked to render that

possession an actual possession to the extent of those boundaries. While he was so in possession, the plain-

tiff in error entered beneath the surface by a tunnel or other excavation, and ousted defendant in error. This entry by plaintiff in error was not until the month of May, 1892, while at the very time of the entry, and for months, if not years, before, the defendant in error was actually engaged in sinking a shaft. The plaintiff in error being without a claim of title to the surface, how can it justify its entry below the surface except under the mining laws? Certainly, if both parties were trespassers, there can be no doubt that the prior possession of the defendant in error would be sufficient as against the subsequent entry by plaintiff in error, if the entry was made upon the surface, and the ouster was there committed. Is the rule different because the entry was below the surface, and by way of a tunnel? Surely not. "Cujus est solum est usque ad coelum." Brown, Leg. Max. 395. While admitting the existence of this rule, counsel for plaintiff in error earnestly contends that the rule is different when the lands in controversy are mineral in character, and insists that a trespasser may have such possession of the surface of the earth as would enable him to maintain ejectment against a subsequent intruder who entered upon the surface, and ousted him, and that such possessions may still be insufficient to enable him to maintain ejectment against the same intruder if he enter beneath the surface upon a vein of mineral, and this without reference to the mining laws; but he has referred us to no case which sustains his contention. We hold the rule to be the same as to all character of lands, and that there can be no distinction between an ouster upon the surface and ouster beneath the surface, except in cases arising under the mining laws by virtue of section 2322, Revised Statutes.

Complaint is made that the court directed the jury that if they found for defendant in error they should assess his damages at a given sum. The transcript shows that two affidavits were offered and admitted in evidence in the same connection at folios 376, 377 and 378 of the record. One refers to the question of damages, as appears by the

ERROR: evidence:
omission from
record: presumption.

statement of counsel, and both are omitted from the record. Counsel for defendant specially called attention to this omission on the argument, and his claim is that these affidavits supported the judge's instructions on the measure of damages, and opposite counsel has made no effort to supply the omitted evidence. We have just held in the case of *Witt v. Cúenod* (handed down this day), that where the claim of error is based on a question of fact, the correctness or incorrectness of which can not be discerned from the record, the burden of showing error is not met, and the presumption of the correctness of the judgment of the lower court obtains. We cite, also, in support of this position, *Cattle Co. v. Sully*, 144 U. S. 209. The judgment of the lower court is affirmed.

Hamilton and Bantz, JJ., concur.

[No. 736. October 2, 1897.]

THE SANTA FE ELECTRIC COMPANY et al., Appellants, v. CHARLES C. HITCHCOCK, Appellee.

MORTGAGE—GOOD WILL.—The mortgage of the entire assets of a business can not be construed to include its good will, in the absence of any conveyance of the good will either expressly or by fair implication.

ID.—CORPORATIONS—LEASE—MERGER—FRAUD.—Where a majority of the stock of an electric lighting company was purchased by persons, who became directors, assumed control of the company and formed and became directors of a new company, under their control, the purpose of both being to furnish light; and the directors of the new company by virtue of their position in the old, obtained a lease of all the poles and wires of the latter, so that its plant and machinery could not be operated, the former retaining power to terminate the lease at any time, but binding the old company not to terminate it for eighteen months, a mortgage having been given, before the establishment of the new company on all the property of the old, which had become much depreciated in value; the president of the new company testifying that, but for the mortgage, the two companies would have consolidated—Held: Conclusive evidence of fraudulent combination to defeat the mortgage.

ID.—CORPORATIONS—LEASE—MERGER—LIABILITY OF NEW COMPANY—AFTER ACQUIRED PROPERTY.—A lease by one corporation to another of all its poles and wires, so that its plant and machinery could not be operated, was a sufficient merger into the other to render it liable for the debts of the former; but the merger did not render the property of the new company an accretion of the old company, so as to fall within a mortgage on the entire assets of the latter including all after acquired property.

Appeal, from a decree for complainant, from the First Judicial District Court, Santa Fe County. Modified and remanded, with directions.

The facts are stated in the opinion of the court.

EDWARD L. BARTLETT and EUGENE A. FISKE for appellants.

“The equitable lien of creditors of the old company upon its property would continue until after a transfer to a purchaser for value; but they would have no equitable lien upon the assets of the new company and would have no right to rank as its creditors.” *Morawetz Corp.*, sec. 811. See, also, *Id.*, sec. 812.

It is only after a mortgagee has foreclosed his mortgage in equity, and finds that the proceeds are insufficient to pay the mortgage debt, that he has any remedy against one who has unlawfully acquired property covered by the mortgage; and then his remedy is at law, and not in equity, and his measure of damages is not the full amount of the unpaid indebtedness due him, but only the difference in value of the mortgaged property with or without the property so alienated. *Heath v. Hale*, 24 S. E. Rep. (S. C.) 300, 303, 304; *Lavenson v. Soap Co.*, 22 Pac. Rep. (Cal.) 184; *Heitkamp v. Granite Co.*, 59 Mo. App. 244.

The capital stock in the old company, subscribed for and not paid in full, is an asset of the old company, if that company be insolvent, and creditors may call upon that asset to pay any deficiency that may arise after a sale of the mortgaged property. 2 *Morawetz Corp.*, secs. 820, 821; *Hatch v. Dane*, 101 U. S. 205; *Upton v. Triplecock*, 91 *Id.* 47; *Sanger v. Upton*, *Id.* 60, 61.

GEORGE W. KNAEBEL for appellee.

The electric system and its additions, including all the present and future property, business, custom, good will, etc., described in the mortgage, were in the hands of the Santa Fe Electric Company, its officers and directors, as a quasi trust fund, to be administered for the benefit of the stockholders and creditors of that corporation, and the subsequent fraud has not destroyed the trust. On the contrary, the fraud has enlarged the trust fund. *Jones v. Mechanical Co.*, 38 Ark. 25; *Wood v. Dummer*, 3 Mason, 312; *Curran v. Arkansas*, 15 How. (U. S.) 308; *Drury v. Railroad Co.*, 7 Wall. 299; *Abbott v. Hard Rubber Co.*, 33 Barb. 578; 1 Story Eq. Jur., sec. 323; 8 Am. and Eng. Ency. of Law, 1371; *Willett v. Blanford*, 1 Hare, 270; 2 Pom. Eq., sec. 1070; 1 Perry on Trusts, sec. 427; *Morawetz on Priv. Corp.*, sec. 810; *Insurance Co. v. Transportation Co.*, 13 Fed. Rep. 516; 1 Beach on Priv. Corp., secs. 326, 327, 360; 1 Reid Corp. Finance, secs. 182. 213-215, 521; *Jackson v. Ludeling*, 21 Wall. 616; 1 Thomp. Com. Corp., sec. 332; 5 Id., sec. 6547.

By the express terms of the mortgage it is made to embrace future acquired property, and all accretions and accessional subject-matter. 3 Am. and Eng. Ency. of Law, Title "Confusion," 660; Id., Title "Accession," 50, 58; Story on Bail., sec. 292; *Diversey v. Johnson*, 93 Ill. 547; *Southworth v. Ishing*, 3 Sandf. 448; *Ex parte Ames*, 1 Law Dec. 361; *Jenks v. Coffee*, 1 R. I. 511; *Hamlin v. Gerrard*, 72 Me. 62; *Galveston R. R. v. Cowdrey*, 11 Wall. 482; 3 Pom. Eq. See, also, as to decree for a contingent deficiency, Equity Rule 92 (U. S. Sup. Ct.) relating to territorial courts.

COLLIER, J.—The appellee, Charles C. Hitchcock, filed his bill of foreclosure on April 23, 1895, against the Santa Fe Electric Company and the Santa Fe Gas & Electric Company, two domestic corporations, and the Illinois Trust & Savings Bank, a foreign corporation, with no resident agent in the territory upon whom service might be made. The domestic

corporations appearing, pleaded to the suit, and service by publication is claimed to have been sufficiently made as to the foreign corporation by publication; and, it not appearing, a decree pro confesso was entered as to it prior to the final decree made in behalf of appellee in the court below against all of the defendants. The bill is for the foreclosure of a mortgage executed by the Santa Fe Electric Company to secure its promissory note given to appellee for the sum of \$5,000, with interest at 12 per centum per annum, upon which default in payment of interest had been made, and an election made by appellee to consider the entire sum due, as provided. The property covered by the mortgage was specific parcels of real estate, future to be acquired property of every description, "all the tolls, incomes, issues and profits arising out of said property, and its (the mortgagor's) franchise or franchises, its wires, poles, materials, coal, wood and property of every kind and description, real, personal or mixed, whether as lessees or holders or owners of the stock or bonds of any other corporation or corporations, association or associations, or however such interest of the Santa Fe Electric Company may be regarded in law or in equity as subsisting or inhering in the aforesaid premises and property, or any part or parts thereof." All after acquired property, etc., shall inure by way of accretion to the benefit and advantage of appellee and his assigns by way of further and better security. The Santa Fe Electric Company (hereafter to be called the "old company") was on October 18, 1893, a corporation engaged in the business of generating and distributing electric light to the inhabitants of the city of Santa Fe, at which time it executed the note and mortgage in this suit, and had at that time its plant, system, and customers as a going concern, and paid interest on said note up to October 18, 1894, making default in payment of further interest prior to the bringing of this suit. The evidence showed the property embraced in the deed of trust was worth about \$16,000. The Santa Fe Gas & Electric Company (hereafter to be called the "new company") is joined as a defendant in this suit, upon the theory that it is an extension

and enlargement of the old company, and that all of its plant and system comes under appellee's mortgage, "by way of accretion to the benefit and advantage of appellee and his assigns," just as if the same extension and enlargement had been made by the old company. The Illinois Trust & Savings Bank is joined for the purpose of establishing the priority of appellee's mortgage over that given by the new company to said savings bank as trustee. Appellants offered no evidence, and claimed no case was made by appellee under the proof.

The facts of this case are substantially as follows: The old company was, at the time it executed the note and mortgage in suit, the owner of the parcels of real estate described in the mortgage, and was using the improvements constructed thereon in carrying on its business, and this real estate and improvements had their principal value as being so used. It also had its machinery, consisting of dynamos and other electric apparatus in its power house, and its polls and wires and customers, being in the full occupancy of a field which the proof shows was not sufficient for two concerns of its nature to do business in. The business does not appear to have been profitable, but during the period of several months prior to November, 1894, its financial condition improved, so that its assets appeared to be sufficient or likely sufficient to discharge the obligation it was under to appellee, it being the only lien thereon. In August, 1894, the new company was organized, with Samuel H. Day, Percival B. Coffin, Edward L. Bartlett, Charles H. Coffin and Julius M. Howells as its directors, all of whom continued as such directors until after the filing of the bill in this cause. Day was made president, and he and Howells were the active men of the board, Howells acting on behalf of the Municipal Investment Company of Chicago, subscriber to 996 shares of the total of 1,000 shares constituting the capital stock, in which interest were also the two Coffins. Howells, Day and the Coffins were at this time interested in and connected with the Water & Improvement Company at Santa Fe, and the new company, it was contemplated, would be a most valuable customer of the water company, and did so become,

in the sum of \$300 per month, in the furnishing of water power for the generating of electricity, while the old company, under what was denominated its more expensive process, used coal, and could never become such a customer. The plan, as stated by Day in his testimony, was to combine the conflicting interests of the old company and the gas company, also furnishing light in Santa Fe, by the organization of a new company, which was to be a customer of the water and improvement company. Day and Howells proceeded between August and November, 1894, to acquire the stock in the gas and old electric company, paying cash straight out for some, and part cash and stock in the new company for the remainder, representing that the purpose also was to pay the debts of the old companies, believing in this way the good will of those to whom they would look for custom would be secured. Creditors were to be offered stock in the new concern, and, if the plan completely succeeded, the old company was to go entirely out of existence, in name as well as in fact. Appellee, however, would accept nothing but cash for his obligation, and Day says: "It blocked the scheme, and we were unable to carry it out as fully and completely as we desired to do, for the reason that this mortgage had to be disposed of in some way, and for that reason the two organizations have been continued, in fact, as they have always been, as separate organizations, until to-day." He also says: "Mr. Howells was the moving spirit, as the inventor of the scheme, the originator of it here, and his backers in Chicago were the Municipal Investment Company." Having acquired a large majority of the stock of the old companies prior to the stockholders' meeting in November, 1894, Day and Howells caused themselves to be elected its directors, in a board composed of themselves, E. A. Fiske, C. W. Dudrow, and H. B. Cartwright. E. A. Fiske was made president, and S. H. Day the general manager; and on December 1, 1894, they took charge of the affairs of the old company, with P. B. Coffin as secretary and treasurer, who, as treasurer, gave bond, with Charles H. Coffin and J. M.

Howells as his sureties, and S. H. Day also produced, as sureties on his bond as general manager, the same persons. The two companies now had S. H. Day for general manager, and P. B. Coffin for treasurer, and S. H. Day and J. M. Howells directors. There was from this time but one office for the two companies, and in the carrying on of the business professedly in the name of the old company up to April 1, 1895, and in the payment of old indebtedness other than the mortgage indebtedness, the Municipal Investment Company advanced to the treasurer of the old company about \$2,000. In anticipation of the new company being ready to begin operations, a lease was made to it by the old company on March 4, 1895, of all its poles and the wires, fixtures, and apparatus for the distributing and supplying of electric light, at the rate of \$100 per annum, the rental to begin from the date of the execution of the lease. The new company acquired full and uninterrupted use of, and the right to use, all such poles, wires, etc., for the purpose of conducting, supplying and distributing electric light and power to any and all points and places, etc., "with full right and power to use and operate the said business under the franchises of" the old company. This lease does not bind the new company to continue to pay rental for any specified time, however short, but only "for such time as the said party of the second part may desire the same;" but the old company can not terminate the lease under a year, and only then by notice given after the year, to take effect not earlier than six months. Notwithstanding this lease took effect on March 4, 1895, the poles, wires, etc., continued to be used in the business carried on in the name of the old company until connection was made, on April 1, 1895, with the power house of the new company. At this time, without any prior arrangement having been made with any of the customers of the old company other than the city of Santa Fe, or between the two companies, so far as the record of action by the board of directors shows, the business of the old company was carried on by the new, and has been ever since. On April 16, 1895, the officers of the old company, as its minutes recite, report that "the

Santa Fe Gas and Electric Co. have secured the contract for lighting the city for the year beginning April 1, 1895, and have also made contracts with many of the largest customers of this company. The Santa Fe Gas and Electric Co. is operated by water power, which is cheaper than power produced from coal. In view of the above facts, and with the certainty that in the future the company must be operated at a heavy loss, the officers thought it was to the best interests of the company to close down the plant for the present, and they report that they have therefore closed down the same, and have discharged its employees." The minutes report that, after full discussion of the report of the officers, their action was unanimously approved. At this meeting there were present S. H. Day, E. A. Fiske, H. B. Cartwright, directors, and P. B. Coffin, secretary. The bill does not specify any particular property as subject to the lien of the mortgage other than such as is described therein, nor does the evidence identify the alleged accessional property, further than as extension and enlargement, the additional real estate being in no way described. It should also be stated that the lease provided for the new company detaching and taking away all the poles, wires, fixtures, etc., which it shall construct and attach to the leased property.

A clear understanding of the case seems to demand a somewhat lengthy statement of facts, such as we have given.

It is claimed by appellants that the case of the Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436, is decisive of this case, in favor of the Santa Fe Gas & Electric Company, called in the statement the "new company."

MORTGAGE: good will.

The case referred to was where the complainant, holding a first mortgage on a newspaper plant, sought to make it cover an entirely new plant, not described in the mortgage. The facts of that case were that the plant described in the first mortgage was sold under a second mortgage, and a grantee of the purchaser, in the course of time, substituted one part and another of the machinery of the plant originally received, so

that at the time the note secured matured, none of the original presses, type, and property described in the mortgage were in existence. The court said: "The bill was not framed on the theory of holding the defendant for the value of the mortgaged chattels on the ground of wrongful conversion, nor was it charged that there was any wrongful intermingling of the original plant with that subsequently acquired, either by the mortgagor or the purchaser under the second mortgage or his grantee. The allegation was that the machinery, type, presses and property of a perishable nature had been alienated or destroyed or gradually used up. This was done in the course of business, and as the plant on hand at maturity of the note was an entirely new plant, not described in the mortgage, we think the mortgage could not be extended to it on the theory of willful intermingling. The clause in the first mortgage in relation to after-acquired property was an executory agreement for the performance of which the mortgagee might recover compensation in damages as against the mortgagor; but, as against the grantee of the purchaser at the sale, the lien of the mortgage could not embrace what had no existence when it was given, and was not acquired by the mortgagor; and, if such grantee was liable at all, it would be for conversion of existing property." The court appears to avoid saying that it would not subject all accretions resulting from a wrongful intermingling which could not be separated without injury, and argues to show this case does not come under any such rule. It is unnecessary, however, to further discuss that case, as we do not think this case is one of intermingling. From the evidence we think it could be ascertained what were the poles, wires, and apparatus covered by the mortgage, and, if there was any intermingling, it was that of the business of the old with that of the new company. If the principle of intermingling business should have effect, it must be on some other theory than that of mere capture or conversion of business. Business is a tangible thing, just as poles and wires are tangible things. The value can be proved, and for its destruction a remedy at law is adequate. If there were the

element of good will in this case, it would present a different question. In *Metropolitan Bank v. St. Louis Dispatch Co.*, supra, good will is said to be "tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently." We have carefully read the mortgage of complainant to find therein any conveyance of good will, but discover no language expressly or by fair inference to such effect. We know of no rule that makes the mere mortgaging of the entire assets of a business also the mortgaging of its good will. In the case of a lease of a business, such a rule might obtain without it being expressly stated, but not so with a mortgage of assets.

The decree of the court below, in the form it is made, can be sustained, if at all, upon one proposition, viz., that the transaction whereby the business of the old

CORPORATIONS:
lease: merger:
fraud.

company has come to be carried on in the name of the new company made no legal change in the status so far as complainant is concerned.

The testimony can not be carefully read in this case without its producing in the mind a conviction that fraud was perpetrated upon complainant. There can be no reasonable doubt that, but for the interference of the new company, the assets of the old could have been made to satisfy complainant's claim, being the only lien. We find many cases where sales are set aside because of the fraudulent conduct of the directors of corporations, and declaring that the purchasers at such sales are liable as trustees to the extent of the property they received. Such are the cases of *Jackson v. Ludeling*, 21 Wall. 616; *Drury v. Cross*, 7 Wall. 302; *James v. Railroad Co.*, 6 Wall. 752; *Wardwell v. Railroad Co.*, 103 U. S. 651. These cases are useful as showing how severely the law condemns such acts as were resorted to in this case, and we quote from the last above cited the language of Justice Field: "It is among the rudiments of the law that the same person can not act for himself, and at the same time with

respect to the same matter as the agent of another, whose interests are conflicting. The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, whenever their enforcement is reasonably resisted. Directors of corporations and all persons who stand in a fiduciary relation to the other parties, and are clothed with power to act for them, are subject to this rule. They are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect." That one should, in one or more fiduciary capacities, attempt to represent conflicting interests, is no less repugnant to the law than where his own interests is in one scale and that of his principal in another. Generally the result of such a doctrine is that the recipient of property obtained by the aid of faithless agents is held to be trustee of, and accountable for its full value to, the person defrauded, and if he has intermingled it with his own, so that it can not be separated, loss falls on the recipient.

The bill, however, and the decree, in this case, do not stop at this result, nor at the result that the offending recipient shall respond in this suit for the depreciation inflicted on appellee's security, nor that he shall be held to have assumed to pay appellee's debt, but that also the lien of appellee's mortgage is extended over all of the recipient's property under the mortgage clause of after-acquired property. We think that, if either of these three results follow, the bill is maintainable—the two former because of the *nexus* of fraud as to or about the subject-matter of equitable cognizance in the foreclosure proceeding, relief being grantable under the prayer for general relief. The lease executed by the old company to the new company is, upon the principle laid down in the authorities and the facts we hereafter refer to, conclusive evidence of fraudulent confederacy between the governing officers of the two companies. Thus, in *Abbot v. Rubber Co.*, 33 Barb. 579, it is held that directors, even with the consent of the majority of the stock-

CORPORATIONS:
lease: merger:
liability of new
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acquired prop-
erty.

holders, had no right to make a sale of the entire property of a corporation, except of its real estate and machinery and fixtures, against a dissenting stockholder. In the argument, the court says this is also true as to a dissenting creditor. The court said that "directors of a corporation are agents of the corporation to manage its affairs, and carry out the purpose of its organization, and not to inflict on it political death. They are only authorized to do such things as are expressly or impliedly directed or authorized by the charter." What less did this lease accomplish? With its poles and wires in the possession of the new company, the business of the old company and its power house, with machinery, was, as is said in the "Rime of the Ancient Mariner," "as idle as a painted ship upon a painted ocean." Who doubts that thus it was intended to be? Day says: "It blocked the scheme, and we were unable to carry it out as fully and completely as we desired to do, for the reason that this mortgage had to be disposed of in some way, and for that reason the two organizations have been continued." This is as frank as was futile the unanimous approval, by three directors of the old company, of the officers' acts in closing down the works when the company had no wires or poles to distribute its light, two of these three being the officers. The transparency of this deception as a business proposition is also shown by the acts of both of the contracting parties. Thus, the new company was paying for the poles, etc., for four weeks before it could use them with its power house, and while the old company was using them, and the old company gave the new company the right to return them at any moment it chose, but could not take them back under eighteen months. "The scheme to acquire the property of this corporation was in its inception fraudulent, and every step in the progress of its execution was necessarily stamped with the same character." *Drury v. Cross*, *supra*. This language only needs to be changed by inserting for "in its inception," the words "from the time they could not settle with Hitchcock." Did this amount to a consolidation? "A lease may amount to a consolidation, and consolida-

tion has frequently taken the form of purchases by one corporation of the shares of another." Beach, Priv. Corp., sec. 326. "Where an old corporation sells out to a newly-organized one, and turns over all of its property, the new company becomes liable upon the debt and contracts of the old." Id. sec. 360. What lease could there be more amounting to a merger of one corporation into another than this, as this stripped the old company of life, as was fraudulently intended? We find in *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.*, 13 Fed. Rep. 516, the following language: "The sale by the Babbage Company of all its property to another corporation, composed mostly, if not wholly, of the same persons, was fraudulent and void as to all the creditors of the former company not assenting thereto. The purchaser knew that it was buying all the property of the seller, and that, by the transaction, the latter was deprived of the means and power of meeting any of its outstanding obligations. The fair inference from the transaction was that the old company was about to be dissolved, and to cease to be. It was to be absorbed by the new company. This was the inevitable consequence of the formation of the new company, composed substantially of the same persons, to transact the same business, at the same places, and with the same property. By the transfer, the creditors of the old company were deprived of the means of enforcing their claims." Instead of "all its property" say "property essential to enable it to do business," and for "Babbage" say "Santa Fe Electric," and for "sale" say "lease," and scarcely another word need be changed, except the case could be more strongly stated in that the fraud here was directed singly and only against appellee. The stockholders of the old company came into the new, the officers and offices were the same, the business the same, and appellee is deprived of the means of enforcing his claim, if the testimony as to depreciation is true.

The testimony, uncontradicted, as to value, is that the plant was worth \$16,000; and, as confirmatory of that theory, the new company, or at least the owner of three-fourths of the stock, caused Howells, the director of both companies, to pay

forty cents on the dollar in cash, or twenty cents in cash and the remainder in stock in the new company, for stock in the old company, which tends to demonstrate a value over and above, not only the mortgage, but all other indebtedness. We do not think any of the authorities go to the extent of this mortgage over the plant, etc., of the new company, but the fraud shown in this case gives jurisdiction for a court of equity to proceed to a disposition of all matters relating to the subject-matter of its cognizance. As it has been reasonably well proven that, without this fraudulent intervention on the part of, and collusion between, the officers representing both the old and new companies, appellee could have made his money out of the property covered by his mortgage, appellee should proceed to sell the property embraced in the mortgage, and, the amount realized from the sale being reported to the court, a deficiency decree should be rendered against both the old and the new companies for the remainder. This case is remanded to the lower court, whence this appeal came, with directions to proceed in conformity with this opinion—that is to say, a decree will be entered in this court directing said court to enter a decree therein modifying the decree appealed from, so that appellee may have his decree of foreclosure against the appellant the Santa Fe Electric Company as to all the property embraced in the deed of trust given by it to the appellee, and providing for the sale thereof; and, further, if it shall appear that, upon a sale thereof, a deficiency remains to be paid upon the decree as heretofore entered, that a deficiency decree be entered against the said Santa Fe Electric Company and the Santa Fe Gas & Electric Company, together with the sureties upon the appeal bond given in this cause, to the extent of said appeal bond, or so much thereof as may be necessary; and that the said decree be in all other respects affirmed, except that the said deficiency decree shall not be taken as prior in lien to the deed of trust given by the said Santa Fe Gas & Electric Company to the said Illinois Trust & Savings Bank, with costs of this appeal to be paid by each party, respectively, as incurred; and the decree to be entered

in this court shall provide that in further proceedings in the district court said court may enter and make all orders, interlocutory or final, as may be necessary in furtherance hereof.

Smith, C. J., and Hamilton and Bantz, JJ., concur.

[No. 709. October 2, 1897.]

WELLS FARGO & COMPANY'S EXPRESS, Appellee,
v. WILLIAM A. WALKER, Appellant.

PROMISSORY NOTE—MASTER'S FINDINGS OF FACT—SUFFICIENCY.—In a suit on a note, referred by consent to a master, his findings of fact, which were sustained by the evidence, were conclusive. *Field v. Romero*, 7 N. M. 630; *De Cordova v. Korte*, Id. 678.

ID.—PRINCIPAL AND SURETY—FRAUD—RELEASE OF SURETY.—Where, in a suit against a surety on a note, it appeared that the note had been given by the principal for money embezzled by him while in complainant's employ, for which he had been discharged, and the surety signed the note without any knowledge of these facts, which were withheld from him by complainant and its agents, and that, had he known the facts, he would not have signed the note—Held: That complainant was guilty of such fraud as to vitiate the note as to the surety.

Appeal, from a judgment for complainant from the Second Judicial District Court, Bernalillo County. Reversed and remanded, with directions; Bantz, J., dissenting.

The facts are stated in the opinion of the court.

F. W. CLANCY and NEILL B. FIELD for appellant.

Complainant was bound to disclose to Walker the fact of Gilbert's dishonesty. Story, Eq. Jur., sec. 215; Brandt. on Suretyship, 422; Bayl. on Sur. 294; *Wilmington, etc., Co. v. Line*, 18 S. C. 116; *Franklin Bank v. Cooper*, 36 Me. 179; *Cotzhansen v. Simon*, 47 Wis. 103; *Bank v. Owen*, 101 Mo. 581; *Insurance Co. v. Thompson*, 68 Cal. 208; *Sooy v. New Jersey*, 39 N. J. Law 135; *Lee v. Jones*, 108 Eng. Com. L.

397; *Bank v. Stevens*, 39 Me. 532; *Daughty v. Savage*, 28 Conn. 146; *Densmore v. Tidball*, 34 Ohio St. 411.

A contract of suretyship imports good faith and confidence between the parties in regard to the whole transaction, and if a party taking a guarantee from another suffers him to enter into the contract under false impressions as to the real state of facts such concealment will amount to fraud. *Bayl. on Sur.* 294; *Moss on Bank.* 226; *Etting v. U. S. Bank*, 11 Wheat. 67; *Railton v. Matthews*, 10 Clark & F. 943; *Jewett v. Carter*, 132 Mass. 335; *Jones v. Building Ass'n*, 94 Pa. St. 215.

The finding of the master in this case is entitled to all the weight which is given to the verdict of a jury in a case at law. *Field v. Romero*, 7 N. M. 630; *De Cordova v. Korte*, Id. 678; *Shane v. Petersen*, 99 Cal. 486; *Machine Works v. Construction Co.*, Id. 421; *Garrity v. Hamberger Co.*, 136 Ill. 499; *Spencer v. Levering*, 8 Minn. 461; *Butler v. Cornell*, 148 Ill. 276; *Davis v. Schwartz*, 155 U. S. 636; *Crawford v. Neal*, 144 Id. 585; *Tilgham v. Proctor*, 125 Id. 149; *Medsker v. Bombrake*, 108 U. S. 71; *Richards v. Todd*, 127 Mass. 172; *Mason v. Crosby*, 16 Fed. Cas. 1029.

Complainant, under the evidence in this case, should not have been allowed to recover any portion of the amounts voluntarily paid to the Building and Loan Association. *Life Ins. Co. v. Middleport*, 124 U. S. 534; 18 Am. and Eng. Ency. of Law 214; *Railroad Co. v. Comm'rs*, 98 U. S. 542; *McCrickart v. Pittsburgh*, 88 Pa. St. 133.

C. N. STERRY for appellee.

There was no issue in the pleadings upon which the finding of the master could be possibly based. *Reynolds v. Stockton*, 140 U. S. 254; *Grassholz v. Newman*, 21 Wall. 481; *Tapley v. Martin*, 116 Mass. 275; *McShane v. Howard*, 20 Atl. Rep. (Md.) 776; *Bank v. Stevens*, 39 Me. 582; *Wayne v. Bank*, 52 Pa. St. 343; *Bank v. Brownell*, 9 R. I. 168; *Crown v. Comm.*, 4 S. E. Rep. 721; *Bank v. Otis*, 62 N. Y. 788.

Under defendant's answer, the burden of proof was upon him to show by a preponderance of the evidence an intentional concealment of facts known to complainant, that defendant, Walker, should have known at or prior to the time of signing the note. *Machine Co. v. Farrington*, 23 N. Y. (Sup. Ct.) 591; *Bostwick v. Voohis*, 91 N. Y. (App.) 353; *Dixon v. Pluns*, 35 Pac. Rep. 1047; *Roper v. Sangamon Lodge*, 91 Ill. 518; *Insurance Co. v. Holway*, 8 N. W. Rep. 459; *Railroad v. Gow*, 59 Ga. 694; *Telegraph Co. v. Barnes*, 64 N. Y. 385; *Life Ins. Co. v. Mabbett*, 18 Wis. 698; *Bank v. Mattingly*, 18 S. W. Rep. (Ky.) 941; *Bank v. Brayton*, 22 Atl. Rep. (Pa.) 1045; *McGee v. M. L. I. Co.*, 93 U. S. 93. See, also, *Stewart v. Cattle Co.*, 128 U. S. 383; *Farrar v. Churchill*, 135 Id. 609; *Walker v. Collins*, 59 Fed. Rep. 70; *Roberts v. Bank*, 40 Pac. Rep. 225; *Rench v. Keenan*, 7 South. Rep. 589.

LAUGHLIN, J.—The allegations in the bill of complaint material to this decision are as follows, to wit:

"Second. That heretofore, to wit, prior to December 20th, 1893, E. L. Gilbert became indebted to your orator for money theretofore had and received of and from your orator, in the sum of thirteen hundred and one dollars and twenty-hundredths (\$1,301.20) and that on the twentieth day of December, 1893, for the purpose of securing the payment of said indebtedness, the said E. L. Gilbert, as principal, and W. A. Walker, as surety, made, executed and delivered to Charles H. Young, then and there an agent of your orator, their certain written instrument, of which the following is a true and correct copy:

" 'Albuquerque, Bernalillo County, New Mexico.

" '1,301.20.

December 20th, 1893.

" 'Thirty days after date, without grace, we promise to pay to the order of Charles H. Young, agent Wells, Fargo & Co.'s Express, thirteen hundred and one dollars and twenty cents (\$1,301.20), for value received, with interests from December twentieth, 1893, at the rate of twelve per cent per

annum; having deposited with said Charles H. Young, Albuquerque, New Mexico, as collateral security, with authority to sell the same at public or private sale, or otherwise at his option, on the nonperformance of this promise, and without notice, twenty shares (20), first series stock of the Cooperative Building and Loan Association of Albuquerque, New Mexico. Certificate No. 17.

E. L. Gilbert.

“ ‘W. A. Walker.

“ ‘C. T. Linton. J. L. Stubbs.’

“And at the same time, and as a part of the same transaction and for the purpose of securing the promises in said written instrument contained, they then and there delivered to the said C. H. Young, for and on behalf of your orator, a certificate of stock in the Cooperative Building and Loan Association of Albuquerque, New Mexico, a true and correct copy of which said certificate, with all the indorsements thereon made, is hereto attached, marked ‘Exhibit A,’ and made a part hereof as fully and completely as though herein set out in full. That the said Charles H. Young indorsed on the back of said written instrument, above set forth, an indorsement as follows, to wit:

“ ‘Pay to the order of Wells, Fargo & Co.’s Ex.

“ ‘Chas. H. Young, Agent.’ ”

“Fourth. Your orator further shows that no transfer of said certificate of stock has ever been made since its pledge by the owner thereof, W. A. Walker, to the said Young, for the benefit of your orator.

“Fifth. Your orator further alleges and shows to the court that there is now due upon the instrument of writing hereinabove set out and set forth, to your orator, from E. L. Gilbert and W. A. Walker, the sum of thirteen hundred and one dollars and twenty cents (\$1,301.20), with interest from December 20th, 1893, at the rate of 12 per cent per annum.

“Sixth. Your orator further alleges and shows that the said W. A. Walker has notified the said Cooperative Building & Loan Association not to transfer said certificate of stock upon the books of said association, or to recognize the pledge

of the same as collateral security as aforesaid, and now pretends at times to deny any liability on his part on the said instrument in writing hereinabove set forth, and to deny that your orator has any right to hold said certificate of stock as collateral, or that it is security in any way for the payment of said instrument in writing set forth, but refuses to state to your orator, although requested so to do, any reason for so refusing and so stating, or any reason why said certificate is not collateral security for the payment of said written instrument as aforesaid.

“Your orator therefore prays the aid of this honorable court, that an accounting be had, and the amount due upon said instrument in writing hereinabove set forth be ascertained, and that the same be decreed to be a first and prior lien upon said certificate of stock shown by Exhibit A, hereto attached, and that the defendants E. L. Gilbert and W. A. Walker be decreed to pay unto your orator whatever may be due under the aforesaid instrument in writing, together with all the costs and expenses in this court incurred, and that, in default thereof, said certificate of stock be decreed to be sold according to law, and that out of the money arising from the sale thereof, after deducting from the proceeds of such sale just allowances for all disbursements, and expenses of said sale, including attorney’s fees and counsel fees, and all expenses of this action, the proceeds be applied to the payment of the amount found due to your orator upon said instrument in writing.”

The necessary parts of the separate answer of William A. Walker, defendant to the bill of complaint of complainants, are as follows, to wit:

“This defendant, further answering, says it is probably true, as alleged in the said bill of complaint, that prior to the 20th day of December, A. D. 1893, E. L. Gilbert became indebted to the complainant for money theretofore had and received of and for the complainant, in the sum of thirteen hundred and one dollars and twenty-hundredths (\$1,301.20); and it is also true that on the 20th day of December, 1893, the

said E. L. Gilbert, as principal, and this defendant as surety made, executed and delivered to Charles H. Young, who was then and there an agent of the complainant, the written instrument, a copy of which is set forth in the said bill of complainant and it is also true that at the same time, and as part of the same transaction, this defendant then and there delivered to the said Charles H. Young, for and on behalf of the complainant, a certificate of stock in the Cooperative Building and Loan Association of Albuquerque, New Mexico, a copy of which said certificate is filed with the said bill of complaint; but this defendant denies that he made, executed, and delivered the said written instrument to the said Charles H. Young, or delivered the said certificate of stock to the said Charles H. Young, for the purpose of securing any indebtedness then and there due from the said E. L. Gilbert to the said complainant, except as hereinafter fully disclosed and set forth. This defendant admits that it is true, as alleged and set forth in the said bill of complaint, that the said Cooperative Building & Loan Association of Albuquerque, New Mexico, is now, and for the last five years has been, a corporation duly incorporated under the laws of the territory of New Mexico; and this defendant further admits that no transfer of the said certificate of stock has ever been made by this defendant to the said Charles H. Young for the benefit of the said complainant. This defendant, further answering, denies that there is now due upon the said instrument of writing, set forth in the said bill of complaint, to the complainant from this defendant, the sum of thirteen hundred and one dollars and twenty one-hundredths (\$1,301.20), or any other sum, with interest from December 20, 1893, or from any other time, at the rate of 12 per cent per annum, or at any other rate. This defendant, further answering, says it is true that this defendant has notified the said Cooperative Building and Loan Association not to transfer the said certificate upon the books of said association, or to recognize the pretended pledge of the same as collateral security; and this defendant says he denies any

liability on his part of the said instrument of writing set forth in the said bill of complaint, and denies that the complainant has any right to hold the said certificate of stock as collateral, or that it is security in any way for the payment of the said instrument of writing; and this defendant alleges the fact to be that on the 20th day of December, 1893, and for many years prior thereto, the said E. L. Gilbert was an employee of the complainant, and was then and there a dishonest person, and was well known by the said complainant and its agents and servants to be a dishonest person; and this defendant is informed and believes, and so charges the fact to be, that prior to the said 20th day of December, 1893, the said E. L. Gilbert had embezzled and converted to his own use large sums of money of the said complainant, which fact of embezzlement was on the said 20th day of December, 1893, well known to the said complainant, but was unknown to this defendant; and this defendant alleges that the said complainant and its agents and servants, fraudulently contriving and intending to injure this defendant, and to enable the said E. L. Gilbert to procure this defendant to become the surety of the said Gilbert upon the said instrument of writing, did conceal from the defendant the fact of said embezzlement and wrongful appropriation of funds of the said E. L. Gilbert, with the intention and design on the part of the said complainant, its agents and servants, that the said Gilbert should procure this defendant to sign the said instrument set forth in the said bill of complaint, and should deliver the said certificate of stock therein mentioned, the said complainant, its agents and servants, well knowing that this defendant would not then and there sign the said instrument of writing or deliver the said certificate of stock if informed and advised of the dishonesty and misconduct of the said E. L. Gilbert.

“This defendant, further answering, says that he is informed and believes, and therefore charges the fact to be, that prior to the month of December, 1893, the complainant, its agents and servants, discovered and became aware of the fact that the said E. L. Gilbert, who for a long time prior thereto

had been an employee of the said complainant, was a defaulter, and had embezzled and converted to his own use large sums of money then and there the property of the said complainant, and the said complainant, its agents and servants, then and there intending to deceive the public, and enable the said E. L. Gilbert to find sureties for the money so wrongfully embezzled and converted to his own use, got out and pretended to the people of Albuquerque and vicinity, through the public press and otherwise, that it was then and there the intention of the said complainant, on account of the meritorious services of the said E. L. Gilbert, and on account of his honesty and integrity and the efficient manner in which he had performed his duties as an agent and servant of the said complainant, to promote the said E. L. Gilbert to a position of greater responsibility and of increased emoluments. And this defendant is informed and believes, and so charges the fact to be, that the said action by the said complainant, its agents and servants, was so taken with the intention and design on the part of the said complainant, its agents and servants, that the said E. L. Gilbert should impose upon this defendant or any other person who would be willing to become his surety for the said moneys so wrongfully embezzled and converted to his own use. And this defendant alleges that he was on the 20th day of December, 1893, wholly and entirely ignorant of the dishonest character of the said E. L. Gilbert, and of the fact that the said E. L. Gilbert had embezzled or wrongfully converted to his own use large sums of money, as hereinbefore alleged, but on and prior to the 20th day of December, 1893, the said E. L. Gilbert, as this defendant is informed and believes, with a full knowledge of the said complainant, its agents and servants, pretended and represented to this defendant that he had received from the said complainant a promotion and appointment to a position in the employ of the said complainant of increased responsibility and emolument, but that there was then and there certain irregularities in the accounts of the said E. L. Gilbert, as the agent of the complaint, with the cashier of the Atlantic and Pacific Railroad Company, and such

irregularities rendered it necessary and requisite that the said Gilbert should find security to the said complainant for about the sum of \$1,301.20, and that he, the said Gilbert, had not in fact received the said money, and the same would be paid over by the Atlantic and Pacific Railroad Company and its cashier as soon as there could be an adjustment of the accounts of the said Gilbert with the cashier in accordance with the truth; and the said E. L. Gilbert then and there further represented to this defendant, with the full knowledge of the said complainant, its agents and servants, as this defendant is informed and believes, that, if the said Gilbert could find a surety or securities for about the said sum of \$1,301.20, as aforesaid, he would continue in the employ of the said complainant in a position of increased responsibility and emolument. And this defendant alleges that he relied upon the representations of said Gilbert, so made as aforesaid, as true, and had no knowledge or means of knowledge that the same were in fact false; and although the said complainant, its agents and servants, well knew that this respondent was then and there about to sign the said instrument of writing, relying upon the false representations of the said Gilbert (E. L.), and that this defendant would refuse to sign the said instrument of writing if informed of the false character of the representations so made, the said complainant, its agents and servants, failed, neglected, and refused to apprise this defendant of the false character of the said representations, and of the dishonesty and embezzlement of the said Gilbert, but inequitably and unconscionably remained silent, and permitted this defendant to sign the said instrument of writing, and to deliver the said certificate of stock to the said Charles H. Young, as the agent of the said complainant; wherefore this defendant says that his signature to the said instrument of writing and delivery of the said certificate of stock were, and each of them was, obtained by the fraud and circumvention of the said complainant, and that the same were, and each of them was, without consideration, and that the said instrument of writing as to this defendant was and is, in equity, fraudulent and void.

“Further answering, this defendant says that he is informed and believes, and therefore charges the fact to be, that although it was well known by the said complainant, its agents and servants, on and prior to the 20th day of December, 1893, that the said E. L. Gilbert was a defaulter to the said complainant, and had embezzled and converted to his own use large sums of money of the property of the said complainant, and had therefore been guilty of the crime of embezzlement and felony under the laws of the territory of New Mexico, the said complainant, its agents and servants, as an inducement to the said E. L. Gilbert to make said false representations to this defendant, whereby he induced this defendant to become surety upon the said instrument of writing, and to deliver the certificate of stock to the said Charles H. Young, as agent of the complainant, did hold out and pretend to the said E. L. Gilbert that if he, the said E. L. Gilbert, would procure this defendant to make, execute, and deliver with him the said instrument of writing, and to deliver the said certificate of stock, by way of security for the moneys so feloniously embezzled and converted to his own use by the said E. L. Gilbert, that no prosecution would be instituted and carried on against him, the said E. L. Gilbert, on account of the said felony so committed. And the defendant alleges that although, in equity and good conscience, it was then and there the duty of the said complainant to apprise him, the said defendant, of the dishonest character of the said E. L. Gilbert, and of the fact that the said E. L. Gilbert had theretofore feloniously embezzled and converted to his own use large sums of money of the property of said complainant, yet the said complainant, its agents and servants, well knowing that this defendant would not, if apprised of the true character of the said E. L. Gilbert, and of the fact of the said felonious embezzlement, sign the said instrument of writing, or deliver the said certificate of stock, contriving and intending that the said E. L. Gilbert should deceive and defraud this defendant, and should obtain his signature to the said instrument of writing, and a delivery of the said certificate of stock, by fraud and false pretenses, did

fail and neglect and refuse to disclose to this defendant the true character of the said E. L. Gilbert, and to inform this defendant that the said E. L. Gilbert had theretofore been guilty of the crime of feloniously embezzling and converting to his own use large sums of money of the property of the said complainant. And this defendant is advised by counsel, and believes, and therefore charges the fact to be, that the failure of the said complainant so to apprise this defendant of the dishonest character of the said E. L. Gilbert, and of the fact, which was well known to the said complainant, but unknown to this defendant, that the said E. L. Gilbert had before that time been guilty of the crime of feloniously embezzling large sums of money of the property of the said complainant, amounted in equity to a fraud by the said complainant upon this defendant, and renders the said instrument of writing voidable by this defendant upon the discovery of the said fraud; and this defendant now here pleads the said fraud of the said complainant in bar of all of the relief sought by the said complainant by its said bill of complaint."

"This cause being at issue, upon motion of C. N. Sterry, Esq., solicitor for said complainant, it is ordered, adjudged and decreed by the court that this cause be, and it hereby is, referred to W. D. Lee, one of the standing masters in chancery of this court, to take proofs as to the material allegations contained in the said bill of complaint herein, with directions to him to report the same to the court, with his opinion thereon, with all convenient speed."

"It is hereby mutually stipulated and agreed by and between the parties hereto that the following facts shall be considered by the master to whom this cause is referred, and by the court, to the same extent and as fully and completely as though proper allegations were made in the complaint and in the answer under which proof of the facts might be admitted upon the hearing of the cause, subject, however, to the objection of either party that each, any or all of the said facts are immaterial and incompetent; each party, however, waiving the objection that said facts or either of them are

irrelevant under the issues made by the pleadings. The facts so agreed to be true are as follows: First. The defendant W. A. Walker, prior to the commencement of this action, tendered to the complainant, in lawful money of the United States, an amount sufficient to at that time reimburse the complainant for all sums of money which it had advanced and paid to the First National Bank of Albuquerque, to obtain possession of the certificate of stock shown by Exhibit A, attached to the complainant's bill, also to cover all payments at that time made by the complainant to the Cooperative Building and Loan Association of Albuquerque, as assessment upon said certificate of stock, and then and there demanded the surrender of said certificate. Second. That, at the time of the execution and delivery of said note described in complainant's bill of complaint, the certificate of stock shown by Exhibit A, attached to said bill of complaint, was in the possession of the First National Bank of Albuquerque, New Mexico, as collateral security for loan due to said bank from the said W. A. Walker, which at that time amounted to the sum of \$100; and that, in order to obtain possession of said certificate of stock from said bank, the complainant was compelled to, and did, advance to said bank the sum of \$100, and received from it said certificate of stock, and that said sum so advanced to said bank paid the indebtedness of the said W. A. Walker, to said bank to the extent thereof, and said amount was included in the total amount of said note described in said bill of complaint. This was pursuant to the agreement which was made at that time between the parties hereto, and which resulted in the execution of the note set out in the bill of complaint, and was a part of the transaction. Third. That thereafterwards the complainant, in order to prevent said stock shown by Exhibit A, attached to said bill of complaint, from having fines assessed against it by the Cooperative Building and Loan Association, under and by virtue of its by-laws, paid upon said certificate of stock, to the Cooperative Building and Loan Association of

Albuquerque, assessments duly and legally levied thereon under the by-laws of said association; that the assessments so paid were paid at the dates and in the amounts following, to wit: October 9th, 1894, \$160, on assessments due from March to October, inclusive; on November 27th, 1894, \$20; on December 25, 1894, \$20; on January 29th, 1895, \$20; on February 26th, 1895, \$20; on April 9th, 1895, \$20. These payments were voluntarily made by the complainant, and without any request from Walker that they should be made by the complainant."

The master took proofs, and reported his findings of fact and conclusions of law in favor of defendant Walker, and recommended that the complainant's bill be dismissed, to all of which complainant filed some 26 exceptions; and, on final hearing, the court sustained the exceptions, and found for complainant, and ordered that the said certificate of stock be sold in default of the payment of the sum found due from defendant Walker. From this decree the cause comes here on appeal.

Three general propositions will be considered in this case as they appear from the record: (1) The weight and effect to be given to the findings as reported by the master to the court below upon disputed facts. (2) The liability of defendant Walker upon the note sued on, and signed by him and Gilbert. (3) The right of the express company to recover from Walker the money paid by it to the loan association upon the certificate of stock held by it as collateral security upon said note.

1. The order of reference to the master was general in its terms, and authorized him to take proofs as to all the material allegations in the bill of complaint, and as to all material defenses set up in the answer, as well also as to all the facts set out in the stipulation. There is nothing in the record to show that the order of reference was by consent, but counsel for the appellee in his brief says: "We are not contending that, under the ruling of this court in cases referred

PROMISSORY note:
master's findings
of fact: suf-
ficiency.

to, the order made was not made with the consent of all the parties, but we are contending that the master had no right to reach a final determination of such conclusive character as would bring the case within the rule that the determination of the master upon conflicting facts is binding upon the court. The sixth finding of fact by the master is as follows: "That prior to the twentieth day of December, 1893, E. L. Gilbert had embezzled from the complainant \$1,201.20; and the fact of such embezzlement was well known to the officers and agents of the complainant, and was not known to the defendant Walker to the extent and in the manner as known by the agents of the complainant." The part excepted to is that included in the lines above quoted, and it is contended by appellee that there is no evidence to support that finding. We think there is ample evidence to sustain the master in that finding. The testimony shows that Gilbert told Walker before the note was signed that he (Gilbert) had signed the voucher, but he had not received the money from the cashier of the Atlantic & Pacific Railroad Company, and that, as soon as the cashier returned, the matter would be explained, and that he (Gilbert) only wanted the security for a few days, and that, if he could secure the \$1,201.20, he could take his promotion as route agent. It is stated in appellee's brief that Walker did not know the following facts, which Young, as agent for the complainant, did know, to wit: (1) "That Gilbert, on being charged with the signing of the voucher, admitted to Young that he had actually received the money." (2) "That upon discovering the facts stated, Young or the complainant, indefinitely suspended Gilbert, pending an investigation of the actual facts, and an explanation from Gilbert, from his position as route agent." The testimony shows that the note was actually signed on December 19th, but dated December 20th, and that Young, as agent for the express company, discovered the shortage of Gilbert on December 15th, and called Gilbert's attention to it, and, when he admitted that he had received the money, Young immediately indefinitely suspended him from the service of the company.

These facts were material upon the issues made by the pleading. The testimony also shows that J. L. Stubbs, superintendent of the express company at Denver, and C. T. Linton, inspector of the National Surety Company, which last-named company was liable on a bond to the express company for Gilbert's shortage, both came to Albuquerque on notice from the officers of the express company of Gilbert's irregularities. Then, it is clear that the officers and agents were in possession of those important facts with respect to Gilbert's embezzlement, which Walker was not. From a careful inspection of all the testimony, we conclude that the evidence is ample and sufficient to support the facts material, as found and reported by the master, and that the court erred in sustaining the exceptions of the appellee. We think this case comes clearly within the decisions of *Field v. Romero*, 7 N. M. 630, 41 Pac. 517; *De Cordova v. Korte*, 7 N. M. 678, 41 Pac. 526; *Davis v. Schwartz*, 155 U. S. 636, 15 Sup. Ct. 237; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355.

2. The next question for consideration is as to the law of the case with respect to the liability of the defendant Walker on the note sued upon, upon the evidence as disclosed by the record, and the facts as found and reported to the court by the master. The facts as disclosed by the record are, substantially, that E. L. Gilbert had been employed as the agent of the express company for about eight years prior to the fifteenth day of December, 1893; that on December 14, 1893, H. H. Hatch, the route agent for the express company, checked up Gilbert's accounts in the office, and found them all correct. December 14th the following appeared in the Daily Times, a morning newspaper of general circulation published at Albuquerque, N. M.: "Deserved Promotions. Effective to-day, Mr. E. L. Gilbert becomes route agent for Wells, Fargo & Company, with headquarters in this city. Mr. H. H. Hatch, who has filled the position, has been transferred to the California Division. Mr. Gilbert has been connected with Wells-Fargo for a dozen or more years, most of which were spent as mes-

PROMISSORY note:
principal and
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senger. Five years ago he accepted the position of agent in this city, and has made friends of all who were thrown in contact with him by his gentlemanly and obliging manner. The company has fittingly shown its appreciation of a good man by the promotion." On the next day, the fifteenth of December, the following appeared in the Daily Citizen, an afternoon paper of general circulation published at Albuquerque: "H. H. Hatch, formerly route agent for the Wells-Fargo Express Company, promoted to a position in San Francisco, will leave for the west this evening. He will probably be accompanied west by E. L. Gilbert, the new route agent."

When Gilbert was checked out on the fourteenth day of December, and assigned to duty as route agent, he was succeeded by Charles H. Young, as the agent, and Young testified that: "I made a personal examination on the fifteenth of certain vouchers which are made out in connection with the settlement of moneys received from the Atlantic & Pacific Railroad Company, which were not ordinarily handled by the cashier at this office. This examination disclosed the fact that apparently there was several months' payment due from the railroad company; as I remember, about four. I considered it necessary to interview the cashier of the railroad company with relation to making those payments more promptly. I stated in my conversation with him, the cashier of the A. & P., that payments due our company for July and August, 1893, aggregating \$1,201.20, had not been made. He immediately produced receipts of Mr. E. L. Gilbert, showing his acknowledgments as agent for Wells, Fargo & Company's Express of these amounts. Very soon afterwards I advised Mr. Gilbert what I had learned, and showed him the vouchers, stating that the amounts called for by them had not been accounted for to the company, and requested him to explain. This he could not do, except to say that he had signed the vouchers unquestionably, and had beyond a doubt received the money; and that he considered himself responsible to our company for the \$1,201.20, and would see that it was made good promptly.

* * * A. He was dismissed from the service of our

company on account of certain irregularities existing in his accounts, or, we had better put it, indefinitely suspended, December 15th, 1893." Young also admitted that he had read the newspaper notices referred to, and that he did not inform Walker that he had suspended Gilbert indefinitely from the service of the company; that he did not make the fact of Gilbert's shortage known to Walker or any one else. "Did you and Linton and Stubbs use your endeavors to conceal the fact [of Gilbert's defalcation] from the public?" The answer was: "We did not consider it our duty to advise the public in a matter which was the company's business." And again he said: "It was not my business to sound any warning to the public, even if I had known or felt that he [Gilbert] was unworthy of any assistance." That he knew Gilbert was making tremendous efforts to raise the money or procure some one to aid him in giving security for the money. That it was far from his intention to mislead the public. That he knew that, when Walker signed the note, he signed it as surety for Gilbert. That both Stubbs, the agent of the express company at Denver, and Linton, inspector for the National Surety Company, came to Albuquerque on notice sent out from his office of Gilbert's shortage. That the express company was secured for any shortage of Gilbert by the National Surety Company of Kansas City, Mo. That he preferred not to pursue the surety company if the shortage could be settled otherwise.

Walker testified that: "A. I saw it in the papers first, and he (Gilbert) told me that he had been checked out when the office was turned over to Young, and he had checked out all right, but, in looking over the vouchers from the A. & P., there was a shortage of \$1,201.20 found; that there was a mistake in the A. & P. accounts, and that he did not know how it occurred at all, but that if he would—the company wanted him to make it good, but that, if they were going to turn him out, he wouldn't make it good; that he knew he was legally responsible for it. I asked him if some of the employees of the office, financial clerk, cashier, or the driver couldn't have been taking that money. He said, 'No,' he didn't lay the

blame on any one in the office at all. That is about all that occurred in that regard." Gilbert said that, if he could secure the money, he could take his promotion as route agent; that there was something wrong about the voucher; that the cashier of the railroad company had given Young the wrong voucher; that he said they had sent the vouchers for August and September receipted, instead of October and November; "that he had never received the money;" that if he (Gilbert) could secure the money for a few days, and until the cashier of the railroad company returned, who was then away, he could explain it all. Walker testified that he was ignorant of the fact that Gilbert had been suspended or dismissed from the service, and was ignorant of any criminality on the part of Gilbert; that he was in and about the office of the express company often with Gilbert, and saw Young, Stubbs, and Linton when at the office between the fifteenth and the evening of the nineteenth, when he signed the note, but had no conversation with either of them about Gilbert's matters; that he had known Gilbert well for five or six years; that they had been for some years past intimate friends; that he had borne a good reputation all this time in Albuquerque for honesty and integrity, and that he had stood well with the express company for honesty, integrity and efficiency as their agent; that he believed and relied upon the statements made to him by Gilbert as the truth, and upon the notices of Gilbert's promotion as stated in the newspapers which he had read at the time, and which had never been contradicted; that if he had not believed Gilbert's statements and the newspaper publications, or if he had known or been informed that Gilbert had in fact received the money, he would not have signed the note and delivered the certificate as collateral.

There is some testimony tending to show that, between the fifteenth and the evening of the nineteenth of December, Young and Stubbs notified the city marshal of Albuquerque to keep watch on Gilbert, and, if he attempted to leave the city, to arrest him. Gilbert told Walker for the first time about his troubles on the seventeenth of December, and Walker then

went with him to different persons, to assist him in raising the money or security; and Walker testified further: "Q. Why did you take all this interest in Mr. Gilbert's affairs? A. Well, Mr. Gilbert had been kind to me, and I knew that whether he was accused wrongfully or not, that the indemnity company and the Wells-Fargo being one and almost the same, that he would have to go to the penitentiary. * * * Q. You didn't succeed in getting money on the 19th, then, or did you visit these people on the 19th? A. I had given it up then, and didn't try to see any one else; and as I was getting in my cart at five o'clock on Tuesday evening, of the 19th, Gilbert and Linton came to me, and Gilbert remarked if I would be willing to let that security for that stock go his security for three or four days. I replied, 'Yes,' and I remarked to him that I was going after Mrs. Walker then; he would have to wait. He said that he would go for her. I got out of the cart and he took the cart, and went after her, Gilbert did. Mr. Linton and I went around to the express company's office. I told Mr. Linton that the security I had was in soak for one hundred dollars. He went to, I don't remember whether it was Stubbs or Young, and told them that he wanted one hundred dollars from them to get this security out. I think Mr. Young gave him the one hundred dollars, and we went around to Ilfeld's, Mr. Stubbs, Linton, and myself, and got the certificate of stock. * * * A. The indemnity company is responsible to the express company for all of its employees, and of course they wish to avoid paying any money if they can; and whenever they can't get security for the money, any shortage, they push the victim to the wall, to keep others from doing likewise, to prevent others from tampering with their funds." It further appears that the note was signed, and the certificate delivered, in the express company's office, in the presence of Young, Stubbs and Linton. There is nothing to show that Gilbert was permitted to resume his promotion with the express company, but his suspension on the fifteenth was final, but he was not arrested for this shortage. Afterwards further shortages were discovered by Young, and on January 9, 1894,

Young made complaint, charging Gilbert with the crime of embezzlement, and he was convicted, and sent to the penitentiary.

The facts are given as fully as possible, because the liability or nonliability of Walker depends upon the facts as disclosed by the record. The defense interposed is fraud, based upon the fraudulent acts and inequitable conduct charged against the express company, its agents and servants. Fraud is never presumed; it must be proved before it is available as a defense; but it may be proved directly or inferentially from all the facts and circumstances, and as well from the failure to state all material facts as from the facts as stated. 1 Story, Eq. Jur., secs. 190-193. In this class of cases there are three well defined lines of decision, viz.: (1) When the shortage or failure to pay over money received within the scope of his duties arises from the neglectful business habits, procrastination or carelessness, or a mere mistake of the agent, not accompanied by a conversion of the moneys of the principal to the use and benefit of the agent, and without any intent on his part to deprive his principal of it, and where there is no moral turpitude, but only a moral delinquency, on the part of the agent, and where the principal has used proper diligence and care in requiring from the agent proper and timely accountings and settlements. In this class of cases it is well settled that the sureties for the agent are bound for the failures to account for moneys received by him within the line and scope of his duties as such agent. Railroad Co. v. Gow, 59 Ga. 685, and authorities there cited. (2) Where the agent embezzles the funds of his principal, and, with intent to deprive him of the same wrongfully, appropriates them to his own use and benefit, where there is no negligence or intentional concealment of the improper conduct and wrongful acts of the agent on the part of the principal, and where the agent procures the bond to be signed by the sureties without the knowledge of the principal. In this class of cases it is a well-settled rule of law that the sureties are bound for the wrongful acts of the agent. Railway Co. v. Shaeffer, 59 Pa. St. 350; U. S. v. Van Zandt,

11 Wheat. 184; Insurance Co. v. Holway, 55 Iowa, 571, and cases there cited. (3) The third line of decisions is that where the principal has discovered or has a well-grounded belief, based upon reliable information, that his agent is a defaulter and a dishonest person, and then either requires security for his fidelity in the future, retains him in his service, holds him out to the public as a trustworthy person or conceals the misconduct and defalcation of his agent, either by his silence or false statement of facts which tend to increase the risk, and thereby the agent secures sureties who were ignorant of the true character of the agent, then the sureties becoming so under such circumstances are not bound.

We are of the opinion that the case at bar falls within the class of decisions last above stated. Gilbert had been the agent of the express company at Albuquerque for a number of years, and had been regarded and held out by it to the public as a trustworthy and efficient agent, and by the public of that city as an honest and trustworthy man. On December 14th, the express company's route agent, Hatch, checked his accounts up, and found them correct, and he was placed in the line of promotion, with additional responsibilities as route agent; and this fact was by Hatch given to the reporter for the Daily Citizen, who printed it as an item of news in his paper, and it is but fair to presume that the item which occurred in the Daily Times was obtained from some of the agents of the express company. It is not contended that these newspaper notices were given out under the authority of the express company, or that it is bound by them, even if made by its agents, but they went out, and were read by the public. Walker says he read and believed them, and Young said he read them, and it is not denied but that these items stated the facts as they then existed; and the public do, and they have a right to, rely upon statements printed in the public press as substantially true. The newspaper man, as a rule, makes a special effort to state in his news items facts only as they exist, and it is admitted that these statements were then true. But these newspaper items contain only a small part of the circumstantial facts, and

while these statements stood for four or five days before the public uncontradicted, and with the full knowledge of the express company's agent Young, holding Gilbert out as a trustworthy man, and still in the service of the company, and then in the line of promotion, yet the true and substantial fact was that Gilbert was a dishonest man, and wholly untrustworthy, and that he had been dismissed or indefinitely suspended, and was no longer in the service of the company, after December 15th, the very day the last item appeared in the public press. And no person but Young knew that Gilbert was a thief and a defaulter, unless it was Stubbs and Linton, who had been notified of Gilbert's defalcation. Young says he did not consider it his duty to "sound any warning" of Gilbert's true character to the public. Walker says that, if he had known the facts and the true character of Gilbert, he would not have signed the note. Young knew that Gilbert was making efforts to procure some one to aid him in this matter. He remained silent, kept the fact of Gilbert's dishonesty to himself, which no one but himself, Stubbs and Linton knew. Walker says the indemnity company and the express company are "almost one and the same," and it is not denied. Then Young says: "We didn't wish to take any action through his surety if the amount due the company could be settled by other means." Before the note was signed, and in the presence of Linton, Gilbert asked Walker if he would let the certificate of stock go as security for a few days; and then, in the absence of Gilbert, Walker told Linton that the certificate was pledged, and they went to the express company's office, and Young let Linton have the \$100 with which the certificate was redeemed. It is contended on the part of the appellee that Walker knew that Gilbert was a defaulter, because he testified that he knew that, whether Gilbert was accused wrongfully or not, he would have to go to the penitentiary if he did not account for the shortage. This position is untenable, because it is the merest conclusion of Walker's, and is without any foundation, a mere statement. Gilbert stated to Walker positively that he had not received the money, and gave as a reason that the wrong vouchers had been

sent to Young, and Walker says he "relied implicitly upon his statements." And this he had a right to do from the actions and conduct of the agents of the appellee at the time.

It is perfectly manifest from the record that the express company, through its agents, Young and Stubbs, remained silent, and studiously concealed from the public the dishonest and untrustworthy character of Gilbert, and thereby inferentially, if not expressly, held out to the public that he was an honest man, and worthy of trust and confidence; and by such acts and conduct on their part, while acting as the agents of the express company, this defendant, Walker, was induced to sign the note and deliver the certificate of stock sued upon in this case; and their acts constitute a fraud in fact and a fraud at law. The inference to be drawn from all the testimony in this record runs to the irresistible conclusion that there was a complete understanding existing between Young and Stubbs, as agents for the express company, and Linton, as agent for the indemnity company, to remain silent and conceal the embezzlement of Gilbert and his dishonest character from the public, for the purpose of enabling him to obtain security for the shortage, and shift the risk from the indemnity company to some one else. True, Young says he had no intention to deceive the public; but his acts and conduct from the fifteenth to the evening of the nineteenth of December spoke louder and were of more force than the mere intent silently inclosed in his breast. It was the duty of Young, when he discovered that Gilbert was a thief, and guilty of a felony, under the law, to have him arrested, and, by so doing, proclaim to the public Gilbert's true character, and not permit him to go free for four or five days, with full knowledge that he was then seeking other innocent people, whomsoever he might impose upon, deceive and rob and for the express benefit of his principal, the express company, and to save the indemnity company from making good the embezzlement.

"When a thief is detected, confidence ought to be withdrawn, at least until those who are likely to be injured by his larcenies have been warned. To persist in supplying him with

money after he has made up his mind to steal, and you know it, is contrary to sound morality, unless you mean to bear the loss yourself. Considerations, not of contract only, but of crime, are involved. A question of honesty is raised, and honesty and equity are one. You can not knowingly expose your own to the grasp of known dishonesty, at another man's risk, he being absent and unwarned. To do so, and make him bear the consequences, is to do, not equity, but inequity." *Railroad Co. v. Gow*, supra. And again it is stated: "Thus if a party, taking a guaranty from a surety, conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of the facts, such a concealment will amount to a fraud, because the party is bound to make the disclosure; and the omission to make it, under such circumstances, is equivalent to an affirmation that the facts do not exist. So, if a party, knowing himself to be cheated by his clerk, and concealing the fact, applies for security, in such a manner and under such circumstances as holds the clerk out to others as one whom he considers as a trustworthy person, and another person becomes his security, acting under the impression that the clerk is so considered by his employer, the contract of suretyship will be void; for the very silence, under such circumstances, becomes expressive of a trust and confidence, held out to the public, equivalent to an affirmation." 1 Story, Eq. Jur., 215. The principle stated and the illustration given by this learned author, we think, apply with great force to the case at bar. That the facts concealed by the agent of the express company did go to increase the risk of the defendant is perfectly plain. It was the duty of the agent to disclose the facts which went to increase the risk, and if he had done so at the proper time, and when he had opportunity, even in the absence of Gilbert, the defendant would not have assumed the risk, and, if so, he would then have been bound; but, instead of making the disclosure which it was his duty to do, he remained silent, and, more, he advanced the money of his principal to redeem the

certificate of stock, that it might be transferred to him, for the benefit of his principal. He knew that Gilbert had been cheating his principal, and he aided him to the extent of the money necessary to redeem the certificate. While the rule stated by Judge Story has not been followed to its fullest extent by all the courts of this country, yet the principle remains unshaken; and it will be found on examination that, when the rule was not followed to its fullest extent, the facts did not justify it, and, when the rule was modified, it was so done to comply with the facts and circumstances of each particular case. Mr. Parsons, in his law on Contracts, states the rule to be as follows: "In general, concealment is not in law so great an offense as misrepresentation, whatever it may be morally. It is certain, however, that the doctrine of fraud extends to the suppression of the truth in many cases, as well as the expression of what is false; for, although one may have a right to be silent under ordinary circumstances, there are many cases in which the very propositions of a party imply that certain things, if not told, do not exist." 2 Pars. Cont. 776; *Kidney v. Stoddard*, 7 Metc. (Mass.) 252. The case of *Dinsmore v. Tidball*, 34 Ohio St. 411, was an action on a bond given by Tidball, as agent, and his sureties, to indemnify the Adams Express Company against loss from the unfaithfulness or dishonesty of the agent. It appears from the statement of the case that Tidball had been station agent of the company at Alliance for some months previous to the execution of the bond, during which period he had embezzled moneys of the company. After the embezzlements occurred, "one Damsell, who resided at Crestline, Ohio, a route agent of the company, who had supervision of local agencies, was at Alliance, looking after a collection of \$700 made by Tidball, which had been delayed in reaching the consignee. At this time, Damsell, in pursuance of general instructions, demanded a bond, with sureties, from Tidball, and furnished him a printed form, to be executed by him and his sureties, without knowledge as to the parties who were to become sureties. This printed form was afterwards signed by the defendants

in the absence of Damsell, and, being thus executed, was transmitted to Damsell at his home, in Crestline." The issue before the jury was as to the knowledge of the Adams Express Company of the defalcation of the agent Tidball previous to the execution of the bond. The verdict was for the defendants, and the court, in the argument in the opinion, said: "Admitting that a principal, in accepting a guaranty for the faithful and honest conduct of his agent, is not bound under all circumstances to communicate to the guarantor every fact within his knowledge which increases the risk, yet we think there can be no doubt, either upon principle or authority, that, when an agent has acted dishonestly in his employment, the principal, with knowledge of the fact, can not accept a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, and to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge under such circumstances would be a fraud upon the guarantor."

The undisputed facts are that the express company and its agent Young well knew of the defalcation of Gilbert, and the facts which increased the risk, and that they had ample opportunity to impart them to Walker, and that they did not do so, and that Walker was ignorant of the facts and circumstances which increased the risk, and that he would not have become security for Gilbert if he had known them. This brings the case directly within the rule laid down in *Wayne v. Bank*, 52 Pa. St. 343, wherein it is said: "We agree that a fraudulent concealment by the bank of the facts that Clark, their teller, was a defaulter at the time the defendant became his security, and accepted by the bank, would have been ground of release, in favor of the latter. Fraud vitiates and avoids all contracts." The case of *Graves v. Bank*, 10 Bush. 23, was a suit on bond by the bank against the defendant, as sureties for Mitchell, to recover for his defalcation as cashier. It appears that Mitchell, as cashier, made his reports from time to time of the condition of the bank to the comptroller, as required by law, and with the knowledge and consent of the

directors of the bank, and that these reports were published in the local newspaper, where the bank was situate, which reports showed the bank in good condition. The defendants read the reports, and afterwards signed Cashier Mitchell's bond as sureties. The court, in passing upon their liability on the bond, said: "We have therefore a case in which the directors of the bank held out to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence. However innocently the publication tending to show that Mitchell was an honest and faithful officer may have been made, the fact remains that the public had the right to act upon the presumption that those directors attesting the accuracy of the statements contained in the publication made some investigation at least to inform themselves as to the matters to which it related. The effect of the published report was to inspire the public with confidence in the officers of the bank, to disarm suspicion, and to prevent inquiry. The losses occasioned by the fraudulent appropriations by Mitchell of the bank's money after acceptance of his bond must fall upon either the association or upon the sureties. The latter are free from blame. They acted in the matter with reasonable prudence and discretion. They relied upon the truth of representations made by those having the right to speak for the bank."

In the case under consideration the losses sustained by the embezzlement of Gilbert must fall upon the indemnity company, or upon the defendant Walker. Linton, the agent of the indemnity company, was present, and took an active part in securing the money with which the certificate of stock was redeemed, and witnessed the note. We think Walker was blameless, and that the express company must pursue its remedy, if any it has, against the indemnity company. The case of *State v. Sooy*, 39 N. J. Law 135, was a suit against the state treasurer and sureties upon his official bond, and the defenses set up by the defendant's sureties' pleas were similar to the answer of the defendant Walker in the case at bar,

except that, prior to signing the bond, they had called upon the state comptroller, and requested information with respect to Sooy's past conduct of the office of state treasurer, which he had previously held, and the comptroller informed them that his conduct in the office had been honest and correct, whereas it had not been so. He had been guilty of defalcations and embezzlements, which fact was known to the officers of the state, but not to defendants. The plaintiff state interposed demurrers to all the pleas, and, assuming the facts stated in the pleas to be true, the supreme court, in delivering the opinion, said: "Such a statement describes a fraud; at all events, a fraud in law. A person called in as a guarantor of the honesty of an employee has the right to infer that the continuance of such employee in the service of the master is a tacit assertion, on the part of the latter, that there has at least been nothing criminal in the past conduct of the servant in the course of his employment. Such an inference is the natural and reasonable result of the circumstances, and hence the obligee is chargeable with the knowledge that the surety is acting on that basis, and with such knowledge it is impossible to acquit him of bad faith if he allows the suretyship to take effect. Where silence is reasonably sure, in the ordinary course of things, to produce the effect of deceit, silence must be culpable, and, in law, the one should be regarded as the equivalent of the other." In the case at bar the very silence of Young, the agent, and the concealment of the true character of Gilbert, and of his embezzlement of the funds of his principal, and that he had been indefinitely suspended or dismissed from the service of the company, induced Walker to believe that Gilbert was still in the employ of the company, and in the line of promotion in its service. This was the natural and reasonable conclusion to be drawn from all the facts and circumstances in the case. It is just what any ordinarily prudent man would do under the same circumstances.

The books are replete with authorities supporting the positions here taken, but we deem it unnecessary to refer to all of them, as those we have cited, we are of opinion, support the

contention of the defendant Walker upon the propositions stated. There are authorities which seem to support the doctrine that, before the sureties can avail themselves of fraud, they must first inquire of the principal the true character of the agent seeking to make the bond. It has been apparently so held in *Insurance Co. v. Mabbett*, 18 Wis. 698; *Roper v. Lodge*, 91 Ill. 518. But we think the facts in these cases not similar to those in the case at bar, and are clearly distinguishable. The case of *Bank v. Brownell*, 9 R. I. 168, is cited as authority that it is incumbent on the surety to make inquiries before becoming such. But the court in that case was careful to say that "we think the safe rule is that, to avoid the bond, there must be, on the part of the creditor, a fraudulent concealment or withholding of something material for the surety to know. Would the facts which the defendant offered to prove, if proved, have amounted to a fraudulent concealment or withholding? It is not alleged here that the directors withheld any information inquired for, or said or did anything which could have a tendency to mislead the surety, or made any—the least—effort to induce the defendant to become surety. If there had been an actual default, and an attempt by the directors to cover it up or reimburse themselves at the expense of the surety, the case would have been different." The last sentence quoted applies to just the facts in the case we have under consideration; that is, that the agents of the express company, acting in harmony with the agent of the indemnity company, attempted to shift the liability of Gilbert's embezzlement of the funds from the indemnity company onto Walker, this defendant. When the Rhode Island court laid down the rule above stated, it was referring to the case of *Bank v. Cooper*, 36 Me. 179, which holds the true rule to be as we have stated it.

The mere fact that Young says he did not expose Gilbert's shortage, because he felt kindly towards him, and hoped he could give a satisfactory explanation of it, is no excuse at all. It has no merit, because the fact remained that he stood by, and in his presence saw and permitted Walker to be

imposed upon by Gilbert, for the benefit of his principal, the express company, and the indemnity company. The contract of suretyship is, as a general rule, for the benefit of the creditor, and the surety is regarded in law as a favored debtor, and the law imposes upon the creditor the utmost good faith and fair dealing towards the surety at every step in the transaction; and it is the duty of the creditor not to knowingly and intentionally allow the surety to be imposed upon by fraud, deceit, or mistake; and if he does knowingly allow him to be so imposed upon, either by refusing to disclose truthful information affecting the risk he is about to assume, or remains silent, failing to disclose information peculiarly within his own knowledge, touching the risk to be assumed, and which the circumstances surrounding the transaction would lead an ordinarily prudent man to believe was not within the knowledge of the party about to assume the risk, and of which, in fact, the party about to assume the risk was at the time ignorant, and a risk which the surety would not have assumed if he had been informed or known the true facts or circumstances, then, under such circumstances, the principal can not recover as against the surety, because the obligation of the surety so obtained is fraudulent. Kerr, *Fraud & M.*, sec. 96; *Bank of Monroe v. Anderson Bros. Min. & R. Co.* (Iowa), 22 N. W. 933; *Magee v. Insurance Co.*, 92 U. S. 93; *Wayne v. Bank*, 52 Pa. St. 343; *Railton v. Matthews*, 10 Clark & F. 943.

In our view of this case, we are of opinion that the master's finding with respect to the testimony of the witness Edwin Bert is conclusive, and it becomes unnecessary to consider it here.

As we have found that the procurement of Walker's signature to the note, and the delivery of the certificate of stock, were fraudulent, and as the note and certificate are in the hands of the original party to the fraudulent acts, and that the payments were all made after notice to the holder that they, the note and certificate, were so obtained by fraud, and as fraud establishes taints and vitiates the entire contract and action, we are of opinion that on that ground, under all the

facts and circumstances as disclosed by the record, the express company can not recover. Long and able briefs were filed by both sides, and able and exhaustive arguments were made by counsel, and, while we have not referred to all the cases cited, yet we have given most of them, and many other authorities, careful consideration. The case will be reversed and remanded, with directions to the court below to enter a dismissal of the complainant's bill, at its costs, on the payment by said Walker to complainant of the sum of \$100, with twelve per cent interest from December 19, 1893, up to the date that Walker made the tender in court or to the complainant. It is so ordered. Reversed.

Smith, C. J., and Hamilton, J., concur; Bantz, J., dissents.

BANTZ, J. (dissenting).—I most earnestly dissent from the opinion of the majority of the court in this case. There is a clear and reasonable distinction between the case of one who signs an obligation as surety for the future good conduct or honesty of his principal, and a case like that at bar, where the surety signed for the payment of a past indebtedness, then definitely fixed. In the former instance it may be true that it is the duty of the obligee to disclose to the surety known past delinquencies which materially affect the risk he is about to assume; but when the surety signs for a specific debt there is no obligation on the creditor to disclose past delinquencies, nor the circumstances out of which the debt arose. With all proper deference, I think the court has misapplied to a case of the latter sort a rule relating to the former, and in doing so has launched a new and very dangerous doctrine. Stripped of verbiage, the rule thus announced is that a surety on a note can defeat recovery, unless the payee discloses the circumstances out of which the debt arose, if it arose out of a breach of trust. Such a proposition is not sustained by any cited case, and is a departure in the law of commercial paper. The distinction between a suretyship for future honesty and one for an existing debt must be obvious upon reflection, and is

quite clearly pointed out in *Machine Co. v. Farrington*, 16 Hun. 591; and in the same case on appeal the New York court of appeals say: "The bond, in terms, referred to an existing indebtedness of Davis (the principal). The defendant made no inquiry of the company to ascertain the particulars, and the company made no representation. If the defendant deemed it material to be informed of the origin, nature or extent of the existing indebtedness, he should have inquired of the company before executing the bond. The company was under no duty to seek the defendant and make the disclosure. It was bound to act with good faith towards the defendant; but to hold the surety discharged by the omission to advise him of the particulars of the previous transaction with Davis, in the absence of any injury upon the subject, would establish a rule which would make instruments of the character of the one in question of comparatively little value." 82 N. Y. 125. See, also, *Burks v. Wonterline*, 6 Bush 24. But the facts in this case do not warrant the application of the doctrine, even if sound. Walker knew that the debt was claimed to be for a shortage as agent, and he admits that he was apprehensive that Gilbert would be sent to the penitentiary. He knew enough to put a prudent man upon inquiry. In *MaGee v. Insurance Co.*, 92 U. S. 98, the court say (while fully recognizing that the slightest fraud by the creditor will relieve the surety): "But there is a duty incumbent on him (the surety). He must not rest supine, close his eyes and fail to seek important information within the reach. If he does this, and a loss occurs, he can not, in the absence of fraud on the part of the creditor, set up as a defense facts, then first learned, which he ought to have known and considered before entering into the contract." "In such circumstances the creditor is under no obligation, legal or moral, to search for the surety, and warn him of the danger of the step he is about to take. No case has gone so far as to require this to be done." "The company had the right to presume that the sureties knew all they desired to know, and were content to give the instrument without further information from any source."

Much stress is laid on the failure to communicate to Walker that Gilbert's employment and promotion had been suspended, and that Gilbert had admitted the receipt of the money. But the undisputed testimony shows that the express company's agent never knew that Walker contemplated becoming a surety until he came in and signed the note. The transaction itself was notice to him that there was a shortage in Gilbert's accounts. *Hamilton v. Watson*, 12 Clark & F. 109. If the creditor was bound to go further, and communicate such collateral matters as that the business relationship with the debtor had ceased, it is hard to tell where the limit would be fixed, and contracts of suretyship and guaranty would become valueless. The range of disclosures would become vexatious and annoying to the principal in the extreme. *Lee v. Jones* (Eng. Exch. B.), 4 Am. Law Reg. (N. S.) 487.

While it is true that the findings of fact by a master upon conflicting testimony will not be reviewed in cases referred by consent, yet it has never been held by this court that a mere scintilla of evidence is sufficient to support such a finding, or that it will be upheld when based upon illegal testimony or on erroneous legal principles. In *Field v. Romero* (N. M.), 41 Pac. 519, such a finding was likened to the special verdict of a jury. But while a verdict which is supported by sufficient evidence, or which is based upon conflicting testimony, or involves the relative credibility of witnesses, is unassailable, it is not otherwise conclusive. *Davis v. Schwartz*, 155 U. S. 631. There must be something more than a scintilla of evidence. The preliminary question for the court is "not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Coughran v. Bigelow*, 164 U. S. 301; *Improvement Co. v. Munson*, 14 Wall. 442. In *Kimberly v. Arms*, 129 U. S. 517, the court say that such findings of a master will not be disturbed "unless clearly in conflict with the weight of the evidence upon which they are made." In *Tilghman v. Proctor*, 125 U. S. 149, the court say that such findings are not to be

set aside "unless there clearly appears to have been error or mistake on his part." In *Crawford v. Neal*, 144 U. S. 585, and *Furrer v. Ferris*, 145 U. S. 132, the court use this language: "Unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand." All those cases were cited and approved in *Davis v. Schwartz*, *supra*. In *De Cordova v. Korte*, 41 Pac. 528, the court say: "If the findings of the master had been based upon illegal testimony, or if he had misapplied the law to the facts, in drawing his conclusion as to them, there would undoubtedly have been good ground for setting his findings aside. *Nail Factory v. Corning*, 6 Blatchf. 332, Fed. Cas. No. 14,196." A master, in such case, can not be upheld, who bases his findings upon vagrant newspaper items or on hearsay testimony. The conversations between Walker and Gilbert should have been excluded. *Machine Co. v. Farrington*, 82 N. Y. 125. Strip this case of the conversations between Gilbert and Walker (which the latter was suffered, under objections, to detail) and the newspaper items, and there is nothing left of the defense. The majority of this court admit that the express company was not bound by the newspaper items, yet by some process an estoppel in pais is assumed, and raised against the company, for failing to contradict them. Walker says he thought that, by paying or securing the shortage, Gilbert would retain his employment and secure promotion. But this belief was founded upon Gilbert's representations made in private conversations and upon newspaper items. Walker never made any inquiry of the company's agent. With all submission, the company was not bound to deny newspaper items, nor probe the mind of Walker to learn what induced him to go on Gilbert's note. Walker admits that he never made any attempt to learn the truth as to any of the representations made to him by Gilbert, because he had implicit confidence in Gilbert's honesty. It is this overconfidence of Walker in Gilbert that is now laid as a fraud at the door of the company.

The majority say the company should have had Gilbert arrested at once, and thus proclaimed to the public his true character. The company did not owe any such duty. If suspicious circumstances carried notice of Gilbert's crime to Young, why does it not reach to Walker? But my learned brothers do not, I think, give credit to the uncontradicted testimony that Gilbert represented to the company's agent just as he represented to Walker, that there was some mistake in the matter, which in time could be cleared up; that he was not criminally guilty, although responsible legally, and would make the shortage good. If Walker could credit that statement, Young had the right to do so, also. Mr. Young quite sensibly and justly observes, "In view of the most positive declarations on his (Gilbert's) part as to his innocence, and in consideration of his long, faithful, and honorable services, we felt it our duty to give him the benefit of the doubt which was hanging over the situation, and that it would be entirely wrong, and a gross injustice, to lead the public to believe that he was a thief and a scoundrel, when possibly he was not." It was not until long after, when other defalcations were discovered, and no explanations were forthcoming, that the conclusion as to his criminality was reached, and his arrest was made, some twenty days after the note was signed. In the meantime an unaccounted shortage appeared, and the company's agent, as a prudent man, required it to be made good or secured. Walker vainly endeavored for several days to induce other persons to lend Gilbert the cash to meet that demand, but without success, and at Gilbert's request he signed the note as surety. When asked why he took so much interest in Gilbert, he answered, "Well, Gilbert had been kind to me, and I knew that, whether accused wrongfully or not, that, the indemnity company and Wells-Fargo being one and almost the same, that he would have to go to the penitentiary." Really, the record in this case discloses no material conflict in the testimony at all; and the conclusions of the master, in my judgment, were based upon suspicions, rather than competent evidence. A jury would not be at liberty to arbitrarily

disregard unimpeached and uncontradicted testimony, and neither can the master. The court below committed no error in setting his recommendations aside. The judgment of the district court should be affirmed.

[No. 734. October 2, 1897.]

JOSEPH BARNETT, Appellant, v. BESSIE BARNETT,
Appellee.

HUSBAND AND WIFE—ACQUEST PROPERTY.—In the absence of any statute of this territory ascertaining the rights of husband and wife, after legitimate separation and during the lives of both, to the property acquired during the coverture, and of any change in the Spanish law as to such property under such status, that law upon the subject, in force at the date of the treaty of cession, must govern.

ID.—COMMUNITY PROPERTY—RIGHTS OF WIFE—FORFEITURE.—While, under the Spanish law, the wife is entitled to one-half of the acquet or community property on the death of her husband, by commission of the act of adultery she forfeits that right.

ID.—PROPERTY RIGHTS—DECREE OF DIVORCE—RES ADJUDICATA.—A decree divorcing husband and wife bars any subsequent action by either against the other to enforce any right growing out of the marital relations.

Appeal, from a decree for complainant, from the Second Judicial District Court, Bernalillo County. Reversed and remanded, with directions.

The facts are stated in the opinion of the court.

CHILDERS & DOBSON for appellant.

Under the Mexican and Spanish law the wife had no vested interest in the community property until a dissolution of the marriage community. Packard v. Arellanes, 17 Cal. 539; Ball on Com. Prop., secs. 32-35; Schmidt's Civil Law,

art. 51; App. to Ball on Com. Prop. 396; Van Moren v. Johnson, 15 Cal. 308; Platt on Prop. Rights of Married Women, sec. 38.

Under the Spanish and Mexican law the wife by adultery forfeited all interest in the community property. The widow likewise forfeited her portion of the matrimonial gains by leading a dissolute life. Schmidt's Civil Law, 396-398, secs. 55, 61-68.

The Spanish and civil law is in force in this territory at the present time with reference to the respective parties upon a dissolution of the marriage relation; and the acts of 1889 with reference to "Descent and Distribution" relates to settlement of community rights where the marriage is dissolved by the death of one of the spouses. In re Buchanan's Estate, 8 Cal. 507.

The decree rendered in favor of the husband, granting him a divorce from the wife, is *res adjudicata* as to her property rights in the community property. Cromwell v. Soc. Co., 94 U. S. 351-358; 21 Am. and Eng. Ency. of Law, 220; Chouteau v. Gibson, 76 Mo. 38; Bryan v. Kennett, 113 U. S. 179; Roe v. Roe, 35 Pac. Rep. 808; Thompson v. Thompson, 31 N. E. Rep. 529.

PATTERSON & WALLACE and JOHNSON & FINICAL for appellee.

While they differ in some minor respects, the principle underlying the various statutory adoptions of the civil law in relation to the community system in the several states and territories is the same, viz.: the equal sharing of husband and wife in the property acquired during the marriage. Ball. Com. Prop., sec. 36; Edwards v. Brown, 4 S. W. Rep. 380; Kircher v. Murray, 54 Fed. Rep. 617.

By the Laws of 1876, Comp. Laws, 1884, sec. 1823, the common law was adopted as the rule of practice and decision in this territory. Browning v. Browning, 3 N. M. 675; Walker v. R. R. Co., 165 U. S. 17 Sup. Ct. 125.

If the legislature of New Mexico had enacted that part of the community system which deprives the wife of her portion of the acquest property if she commits adultery, it would be contrary to the constitution of the United States as depriving her of her property without due process of law. Const. U. S., 5 Amend.

See, also, *Godey v. Godey*, 39 Cal. 157; *House v. Williams*, 40 S. W. Rep. 414; *Hensley v. Lewis*, 17 Id. 914; *Ball. Com. Prop.*, secs. 202, 209.

It seems now to be universally held that the property rights of the spouses may be determined after divorce has been granted, where the decree granting the divorce is silent on that question. *Ball. Com. Prop.*, sec. 209; *Whetstone v. Coffee*, 48 Tex. 276; *Harvey v. Cummings*, 5 S. W. Rep. 513; *Edwards v. Brown*, 4 Id. 380; *Grattan v. Weber*, 47 Fed. Rep. 850; *Godey v. Godey*, 39 Cal. 157; *House v. Williams*, *supra*; 17 Am. and Eng. Ency. of Law, 693; *Ross v. Ross*, 26 Pac. Rep. 1007; *Kirchner v. Dietrich*, 42 Id. 1064. See, also, *Lessee of McCall v. Carpenter*, 18 How. 297; *Packet Co. v. Sickles*, 5 Wall. 580.

SMITH, C. J.—This is a suit brought by Bessie Barnett against Joseph Barnett for a partition or division of all real and personal property standing in the name of or owned by appellant, and alleged to be community property, and acquired during the marriage relation formerly existing between the said parties. The said appellant procured a divorce from appellee on the fifth day of November, 1894, and this suit was brought on the thirteenth day of January, 1896. Said bill of complaint alleges that appellant and appellee were married on or about the tenth day of August, 1891; that, at the time they were married, the appellant possessed and owned no property by inheritance, donation, or legacy during the existence of the marriage community, but that they did acquire a large amount of property, both real and personal, by their joint and separate efforts and labors, as set forth and described in the bill of complaint, and alleges that all said

property is acquest and community property, and that appellee is entitled to one-half interest in and to the same. Appellant filed a demurrer to the said bill, which was overruled, and thereafter appellant filed an answer, and referred to and made the pleadings in the divorce suit a part thereof, and denied that the appellee was entitled to any interest in either the real or personal property. Issue was joined, and Ad. H. Wycoff was appointed special master to take the testimony therein, and report the same to the court, with his opinion thereon. Thereafter appellee asked leave to amend her bill of complaint, alleging the date of her marriage to appellant in 1887, instead of 1891, which leave was granted, and thereafter defendant and appellant filed an amended answer. After the evidence was taken, the master made his report, sustaining the allegations in the bill of complaint, finding in favor of complainant and appellee, and that the property, real and personal, owned and possessed by appellant, was acquest and community property, and found the value of the real estate to be \$13,250, and the personal property of the value of \$7,500, and that appellee was entitled to one-half of the same, together with the further sum of \$175, for money borrowed by appellant from appellee. Exceptions to said master's report were filed, and by the court overruled, to the overruling of which defendant excepted, and still excepts. Final decree was rendered, and appellant prayed an appeal, and gave a supersedeas bond to stay execution of said decree.

Assignments of error: "Now comes the appellant in the above entitled cause, and assigns as errors committed by the court below the following, to wit: (1) The court erred in overruling defendant's demurrer to the bill of complaint therein. (2) The court committed error in approving the findings of law contained in the master's report. (3) The court committed error in approving the findings of fact contained in the master's report. (4) The court committed error in overruling the appellant's exception to the master's findings of law and fact. (5) The court committed error in holding that the decree divorcing the appellant from the appellee was

not a complete bar to any claim of property rights made under the bill of complaint filed in this case. (6) The court committed error in refusing to hold that the appellee having been adjudged, in the decree rendered in the suit for divorce, guilty of adultery, such fact did not forfeit all her rights in the property belonging to the marriage community thus dissolved. (7) The court committed error in holding that the appellee had any rights in the property belonging to the said marriage community which she could enforce prior to the death of the husband."

HUSBAND and
wife: acquet
property: law
governing.

It will not be contended that the appellee became vested with any separate interest under the common law in the property of the appellant acquired during their coverture, and it is not less assured that there is no provision made for her during his life as to such property by any statute of the territory.

Chapter 90 of the Acts of 1889 is "An act to amend the laws relative to the estates of deceased persons," and directs that "one-half of the acquet property which remains after the payment of the common debt shall be set apart to the surviving husband or wife absolutely." It is manifest that this distribution is derived from the Spanish law, and it may be that the limitation as to the time of the operation was suggested by the same code. It is consequential, therefore, that, if any laws have obtained here disposing (during the life of husband and wife) of the property accumulated by them during the continuance of their marriage relation, they are those of Spain and Mexico, as they existed, concerning descents, distributions, wills, and testaments, when this territory became a part of the United States. In 1846 the following announcements were promulgated by Kearney in his Code: Kearney's Code, p. 82, sec. 1. (September 22, 1846): "All laws heretofore in force in this territory, which are not repugnant to or inconsistent with the constitution of the United States, and the laws thereof, or the statute laws in

force for the time being, shall be the rule of action and decision in this territory." Kearney's Code, Pamph., p. 35, sec. 1 (September 22, 1846): "The laws heretofore in force concerning descents, distributions, wills and testaments, as contained in the treatises on these subjects written by Pedro Murillo De Lorde (Velarde), shall remain in force so far as they are in conformity with the constitution of the United States and the state laws in force for the time being." The following, as to the foregoing, was duly enacted and incorporated in the Compiled Laws of 1865 (Act July 14, 1851, Pamph., p. 176, sec. 6): "That all laws that have previously been in force in this territory that are not repugnant to, or inconsistent with the constitution of the United States, the organic law of this territory, or any act passed at the present session of the legislative assembly, shall be and continue in force, excepting in Kearney's Code the law concerning registers of land." Section 1, as above, of the Compiled Laws of 1865, is repeated in the Compiled Laws of 1884, as section 1365, as below: "Sec. 1365. The laws heretofore in force concerning descents, distributions, wills and testaments, as contained in the treatises on these subjects written by Pedro Murillo De Lorde (Velarde), shall remain in force so far as they are in conformity with the constitution of the United States and the state laws in force for the time being." The sequence of proceeding, and the absence of other legislation on the subject until 1887, establish that the civil law as to descents, distributions, wills and testaments obtained here in 1846, and prevailed continuously unmodified to the time of the passage of the "Act regulating descents and the apportionment of estates," approved February 24, 1887, and in force from its passage. This statute expressly repealed all laws in force contravening its provisions, but it does not positively or by implication affect during the lives of husband and wife the acquest property, or direct its disposition until the death of either. An act that became a law February 26, 1889, supersedes the statute of 1887, above cited, but is likewise silent as to acquest property as long as the members of

the marital partnership are both alive, though divorced. In 1891, section 1365 of the Compiled Laws of 1884 was repealed as follows: "Be it enacted by the legislative assembly of the territory of New Mexico: Section 1. That section 1365 of the Compiled Laws of the Territory of New Mexico of 1884, relating to administrations be and the same is hereby repealed." Notwithstanding the inaptness of the phraseology of the above act, we will presume that its object was to repeal section 1365, and will consider it as though such effect were indisputable. If the laws concerning descents, distributions, wills and testaments contained in the treatises on these subjects written by Pedro Murillo Velarde are not now in force to the extent that they are not positively supplanted, the conclusion that there is not extant in the territory any provision as to the rights of husband and wife, while both are alive, to acquiesce property, is irresistible. The common law recognizes no interest in the wife during coverture because of separation. Our statutes are equally deficient as to such status and inevitably the defendant in error is remanded to the civil law for protection, if she is worthy of it.

We will now inquire whether the civil law as to acquiesce property during the lives of the parties who have contracted marriage, and been divorced, has been abolished in New Mexico. It is a recognized tenet of international law that, in the annexation of new territory, its jurisprudence as to rights—not political in character—of its people are acquired with it, and remain in force until substituted by action of the new sovereignty. Says Chief Justice Marshall, in *Insurance Co. v. Canter*, 1 Pet. 544: "It has been already stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognizes this principle, by using the words 'laws of the territory now in force therein.' No laws could then have been in force but those enacted by the Spanish government." The same illustrious expounder,

in *U. S. v. Percheman*, 7 Pet. 82, declares that "the people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed." In *Mitchell v. U. S.*, 9 Pet. 729, Mr. Justice Baldwin, delivering the opinion, announced "that by the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory or province retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed." Mr. Justice Field, in *Railway Co. v. McGlinn*, 114 U. S. 546, elaborates as follows: "It is a general rule of public law, recognized and acted upon by the United States, that, whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country—that is, laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power (and the latter is involved in the former) to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community and promote its health and prosperity which are

strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed."

That no statute of this territory—either that adopting the common law as the rule of practice and decision, or that relative to the estates of deceased persons, or any other enactment—ascertains the rights of husband and wife after legitimate separation, and during the lives of both, to the property of which they became possessed during coverture, has been shown; that a *casus omissus* has thus eventuated will be recognized; that any change of the Spanish law as to the *acquest* property under the foregoing status has been made can not be seriously pretended; and that the foregoing authorities decisively establish that, in such contingency, the law upon the subject in operation at the date of the cession of the territory must prevail, should be unhesitatingly admitted. "Under the Spanish and Mexican law, property acquired by the husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community; whilst property acquired by either by lucrative title solely constituted the separate property of the party making the acquisition. The fruits, profits and increase of the separate property also belonging to the community. By 'onerous title' was meant that which was created by valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions or payment of charges to which the property was subject. 'Lucrative title' was created by donation, devise or descent." "The wife, under the Mexican law, was clothed with the revocable and feigned dominion and possession of one-half of the property acquired by her and her husband during the coverture. During this period the husband is the head of the community, and the law invests him with discretionary power in all matters pertaining to its business or property. In fact, its business is conducted and its property acquired in his name, and his authority in the administration of its affairs is exclu-

sive and absolute. The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true, the wife is a member of the community, and is entitled to an equal share of the acquets and gains, but not so long as the community exists; her interest is a mere expectancy, like that which an heir possesses in the estate of an ancestor, and possesses none of the attributes of an estate, either at law or equity." It can not be that the wife, being subordinate during coverture, becomes an equal,

with equal rights as a feme sole to the property. Powerless during marriage, she must be divested absolutely by divorce, a termination of the marital rights in relation to the community property. It appears in "Practico de Testamento," published by Pedro Murillo De Velarde, as follows:

COMMUNITY prop-
erty: rights of
wife: forfeiture.

"Sec. 12. Of the Surviving Consort. To the surviving consort the laws have conceded a certain right in the property of his consort, and at the same time have imposed upon him certain obligations, which it has seemed convenient to collect and explain in this section. First, The surviving consort has a right to the half of the ganancial (1) property acquired during matrimony. This right is based on the community or legal partnership existing between those married, as the civil effect of the marriage. It does not hold in case of divorce, because the consort who gave cause therefor loses the right to the ganancial property; nor in case of apostacy of either of them; and although, by ancient law, it was lost through the crime of treason, the penalty of confiscation, which followed from it, and was the cause of that loss, being abolished by our constitutional law, the rights subsists. The widow who lives unchastely also loses it, in favor of the heirs of her husband." Says Ballinger in his treatise on Community Property: "Upon the dissolution of the community by death or legal separation, the ganancias are to be divided equally." Says the same author: "The wife forfeits her matrimonial gains when she has been

guilty of adultery or abandoned her husband without his consent." Says Schmidt in his publication of the law of Spain and Mexico, in article 68: "The wife loses her matrimonial gains in the following cases: (1) When she has been guilty of adultery; (2) when she has abandoned her husband without his consent; (3) when she has joined some religious sect, and then married or committed adultery." Says Hall in his work on Mexican Law (section 3081), in specifying those incapable of acquiring because of crime: "(4) The wife condemned as an adulteress in the life of her husband, if the question shall be of the succession of the legitimate children had by the marriage in which she committed the adultery."

It is apparent that the civil law is emphatic in its condemnation of the crime of adultery by the wife; that it is condign in the severity of its punishment for such an offense; and that the defendant in error must be one of the victims of its policy. That there has been no modification in the Spanish code of the requirement of fidelity by the woman in the marital relation, nor any abatement of the penalty imposed upon her for her dissoluteness, must be commended; but that it should be less exacting of the husband, and less proscriptive of him for his unchastity, seems a reproach that can not be too vigorously denounced. That men, the lawmakers, should impose upon the other sex penalties for their misdeeds greater than those they attach to themselves for similar misconduct, is a gross prostitution of power, and a flagrant perpetration of a wrong that is a shame to them, and most pernicious in its demoralizing effects upon society. They who arrogate to themselves superiority, and assume to manufacture public sentiment, should not only refrain from invidious discrimination against women for the violation of their marital obligations, but should so exalt the standard of morality by scrupulous propriety and abstinence from impurity as husbands that they could, by example, demand fidelity from their wives. If men were constrained to purity in fealty to those to whom they have pledged themselves, the latter, in appreciative devotion, would be

unyielding to temptation, and the relation of matrimony no longer a partnership increasing in frequency of dissolution.

We realize that we might have forborne the foregoing investigation, as we do not doubt that the plaintiff in error is

impregnable in his defense of *res adjudicata*, but we have deemed it due to counsel to consider with care their respective contentions. It is wisdom that forbids the multiplication of litigation on the same subject, and spares suitors needless vexation in the determination of their

HUSBAND and
wife: property
rights: decree of
divorce: *res*
adjudicata.

rights. The parties to this controversy, having been separated by final decree of a court of competent jurisdiction are estopped from further harassing each other as consorts in any other tribunal. The marital status having ceased absolutely, no rights which accrued in or by virtue of such relation, and were not asserted in the proceedings for dissolution, can be subsequently maintained. An absolute divorce, or a divorce *a vinculo matrimonii*, or from the bonds of marriage, absolutely dissolves all marriage ties, and destroys the relation of husband and wife. After the date of the decree the man has no wife, the woman no husband. The woman is a *feme sole*. A decree which dissolves the marriage absolutely, and destroys the marriage status, puts an end to all rights dependent upon coverture. After such a decree, the court has no jurisdiction over the parties, and the suit is no longer pending. When the court has entered the final decree, it has no further jurisdiction over the subject-matter, and can not reassume it.

Says the Supreme Court of the United States, in *Aurora City v. West*, 7 Wall. 102: "Courts of justice, in stating the rule, do not always employ the same language; but where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in *rem judicatam*, and the former judgment in such a case is conclusive between the parties. Except in special cases, the plea of *res judicata*, says Taylor, applies not only to points upon which the court was actu-

ally required to form an opinion and pronounce judgment, but to every point which property belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Says the same paramount authority, in *Beloit v. Morgan*, 7 Wall. 622: "The court had full jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the res of that case, but as to all further litigation between the same parties touching the same subject-matter, though the res itself may be different. * * * But the principle reaches further. It extends not only to the questions of fact and of law which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not presented. In *Henderson v. Henderson*, 3 Hare, 115, the vice chancellor said: 'In trying this question, I believe I state the rule of the court correctly that, where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' " In *Le Guen v. Gouverneur*, 1 Johns. Cas. 491, Radcliff, J., says: "The general principle that the judgment or decree of a court possessing competent jurisdiction shall be final as to the subject-matter thereby determined is conceded on both sides, and can admit of no doubt. The principle, however, extends further. It is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the

cause, and which they might have had decided. The reasons in favor of this extent of the rule appear to me satisfactory. They are founded in the expedience and propriety of silencing the contentions of parties, and of accomplishing the ends of justice, by a single and speedy decision of all their rights. It is evidently proper to prescribe some period to controversies of this sort; and what period can be more fit and proper than that which affords a full and fair opportunity to examine and decide all their claims? This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention. A different course might be dangerous, and often oppressive. It might tend to unsettle all the determinations of law, and open a door for infinite vexation. This reasoning is founded in good sense, and supported by the weight of authority. It is equally applicable to the court of chancery as to any other court." "A late case in Wisconsin (1867) affirms the rule thus: 'The rule to be derived from these cases is that the decision of a court of competent jurisdiction, being *res judicata*, is not only conclusive and binding on all other courts of concurrent jurisdiction as to the subject-matter thereby determined, but also as to every other matter which the parties might litigate in the case, and which they might have had decided.' And in no case can one be heard to complain that a judgment was rendered against him in consequence of his own neglect or unskillfulness in developing the proper issues for the decision of the court." In *Bates v. Spooner*, 45 Ind. 493, is the following statement: "When a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with very few exceptions, through our civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case." In *Foster v. Wells*, 4 Tex. 101, it is observed: "It seems that a judgment is not only final as to the matter actually determined, but as to every other matter which the parties

might litigate in the cause, and which they might have had decided." It is recognized in *Thompson v. Thompson* (Ind. Sup.), 31 N. E. 530, that in a suit for divorce all the property rights between the husband and wife were settled by the decree in that case, and that not only what was in fact litigated, but what might have been litigated by such litigation, is settled by the adjudication. In *Fischli v. Fischli*, 12 Am. Dec. 251, it is said: "A judgment or decree obtained in another state is conclusive here as to all matters which were or might have been there adjudicated. Hence a decree of divorce in Kentucky, in which alimony was allowed, concludes the wife from applying in this state [Indiana] for a further provision, although such original allowance was insufficient." In *Kamp v. Kamp*, 59 N. Y. 212, wherein a final judgment was perfected in favor of plaintiff granting a divorce a vinculo, but allowing no alimony, the court says: "The jurisdiction of the court over the subject-matter of the action, and over the parties, in respect to all matters involved in it, terminated with the entry of final judgment therein, except to enforce the judgment and carry out its provisions, or to correct any mistakes in the record, upon proper application, made within a reasonable time. The parties from that time were no longer husband and wife, and had no claims upon each other growing out of the relations before existing between them, except such as were given by the judgment. The court had adjudged that the plaintiff was not entitled to alimony. The law presumes that every question involved in the action (and the right of the plaintiff to alimony was one of the questions) was passed upon by the courts, and the claim to alimony, if made, was decided adversely to the plaintiff, and the adjudication was final. The judgment was final, not only as to the matter actually determined, but as to every other matter which the parties might litigate in the case, and which they might have had decided. The plaintiff was effectually precluded from all claim to alimony by the judgment. The court then lost jurisdiction over the person of the defendant for every purpose, except so far as might be necessary to enforce the judg-

ment actually given." In *Hardin v. Hardin*, 38 Tex. 617, the court declares that "in a suit for divorce all questions of property between the parties should be settled. If not then settled, they are considered waived, and such waiver is final." In *Roe v. Roe*, (1894; Kan. Sup.) 35 Pac. 809, Allen J., states and decides that, "under the law of Kansas, the court rendering judgment in an action for divorce is authorized, on a proper showing, to grant alimony, whether the divorce be allowed or not. If the divorce is granted, it operates as an absolute dissolution of the marriage tie. Whatever orders with reference to alimony or a division of the property are desired by either party may then be considered and determined by the court. If they may be so considered and determined, and a party neglects to require such determination, the judgment is as full and complete a bar as if the question had been fully tried and determined." In *Greene v. Greene*, 2 Gray, 361, at page 365, it is declared that "it is no good exception to show that the matter now offered did not in fact come in question. Such an exception, as said by the chief justice in *Homer v. Fish*, 1 Pick. 441, would render the rule nugatory. It is sufficient that the action was of a nature to admit of such a defense, and that the plaintiff in the new suit might have availed himself of it." In *Dookey v. Kalee Pershad*, 8 W. R. 366, Phegar, J., said: "The necessity of putting some termination to litigation is the foundation of the rule that any issue which is material to the rights of the parties in the matter of suit between them, whether actually contested or not, shall not afterwards be raised in a subsequent suit between the same parties." In *Stahl v. Stahl*, 114 Ill. 375, it is held that, "where a wife procures a divorce from her husband, the court is authorized to make disposition as to the homestead; but, if the court fails to do this, the relation of husband and wife being severed by the decree of divorce, the latter loses all claim to a homestead, so that the husband may sell the premises without her release of homestead right." It appears that a husband is similarly affected by *res adjudicata*. In *Patton Loughridge*, 49 Iowa 218, it is decided: "A claim of the

husband for property of which he has been defrauded by the wife will be presumed to have been adjudicated in an action by the wife for divorce, in which a decree allowing alimony was granted; and he can not afterwards maintain an action on the claim against a party by whose alleged instrumentality the fraud was effected." In *Mott v. Mott*, 82 Cal. 413, is the following: "The settlement of property rights is incident to every action for divorce when there is any property involved, and such settlement may be brought in the cross complaint, as well as in the original complaint."

It is inconceivable that the established principle, "*Inter est republicae ut sit finis litium*," could be more authoritatively sustained or more emphatically exemplified and vigorously vindicated, and that there could be no complication to which it could with greater propriety be applied is easily perceptible. The defendant in error, in humiliation, it must be presumed, at her conscious iniquity, refrained from resistance to the demand of her husband, and, in acquiescence, not only confessed the accusation, but approved the redress prayed, and recognized that she had forfeited all claim to any benefit from the partnership, the articles of which she had infamously violated. Associated upon terms that imposed conjugal fidelity, it was to her credit that, having been false to her obligations, she forbore the assertion of any interest in the affairs of the union during the progress of the proceedings for divorce; and it would have been seemly if, after the termination of the marital relations for her criminality, she had suppressed the manifestation of her covetousness in the attempt to profit by her own wrong. We conclude that as the defendant in error, by her own immorality, forfeited any interest in the property of her husband under the civil law, and as she permitted the dissolution of her marital relations without any demand for any provision for her in the proceedings for divorce, she is without any legal claim against her husband for any of the property acquired by them during their coverture. The decree of the lower court must therefore be

reversed and remanded, with directions to lower court to dismiss the bill, and it is so ordered.

Laughlin, Hamilton and Bantz, JJ., concur.

[No. 719. October 2, 1897.]

HATTIE E. CRARY, Plaintiff in Error, v. NEILL B. FIELD, Executor, et al., Defendants in Error.

DECEDENT'S ESTATE—COMMUNITY PROPERTY—RIGHTS OF CHILD IN ESTATE OF MOTHER.—In the absence of any statute of this territory in 1868, determining the rights of a child in the estate of a mother, dying at that time, leaving the father surviving her, they must be determined by the Spanish law on the subject so far as it was in operation in the territory at that time. *Barnett v. Barnett*, 9 N. M. 205, ante.

ID.—COMMUNITY PROPERTY—RIGHT OF SURVIVING HUSBAND TO SELL. Under the Spanish law, the surviving husband has the power to sell as much of the community property as may be necessary to pay the community debts; and any transfer of such property made by him, in the exercise of that power, conveys a valid title to the purchaser, and the heirs can not restrain him in his action as such survivor, unless it be shown he is prostituting his power, and committing waste, to their injury.

ID.—COMMUNITY PROPERTY—SALE—FAILURE TO APPLY PROCEEDS TO PAYMENT OF COMMUNITY DEBTS—RIGHTS OF BONA FIDE PURCHASER.—Under the Spanish Law, the rights of a bona fide purchaser of community property are not affected by the fact that the surviving husband fails to apply the proceeds of a sale made by him alone to the payment of the community debts.

ID.—COMMUNITY PROPERTY—SALE—PURCHASER'S TITLE—LEGAL PRESUMPTIONS.—Where a husband, surviving his wife, who died in 1868, sold the community property in 1882, and in 1891 one of the children brought suit for her share of the property, and it did not appear that it was not sold for a consideration adequate to pay the community debts; nor was it pretended that there was any collusion or fraud in its disposition, or that the contract value was not paid; nor appeared that the proceeds were not properly applied; nor that the community estate had been so administered she could not receive her share of it without damage to an innocent purchaser; nor that she could not secure redress upon the bond of the administrator,—Held: That the legal presumptions, precluding a reasonable doubt of a paramount title in the purchaser, must be applied.

Error, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County. Reversed and remanded.

CHILDERS & DOBSON for plaintiff in error.

Under the Spanish and Mexican law, the interest of the wife in the ganancial or community property was not regarded as a part of her estate. This interest was not transformed, by her death, into a legal right. *Packard v. Arellanes*, 17 Cal. 539; *Comp. Laws*, sec. 1416; *Panaud v. Jones*, 1 Cal. 513; *Ord v. De La Guerra*, 18 Id. 74; *Scott v. Ware*, 13 Id. 470; *Ballinger on Comm. Prop.*, secs. 230, 231, 239; *Cook v. Norman*, 50 Cal. 638.

The husband as survivor, especially if vested with the legal title of record, is trustee, even if he has no power of disposition, except for the payment of debts; and can convey the legal title to a bona fide purchaser for value. See cases cited *supra*. *Ballinger on Comm. Prop.*, secs. 230-233; *Platt's Prop. Rights Married Women*, 127, 129-143. See, also, *Meeks v. Hohn*, 20 Cal. 620; *Chapman v. Hollister*, 42 Id. 462; *Meeks v. Kirby*, 47 Id. 168; *Platt Prop. Rights Married Women*, sec. 39, pp. 143, 144.

In discharge of his duties, either as administrator or as survivor, sale of community property, after the lapse of considerable time, will be presumed to have been made for the purpose of paying community debts. *Cook v. Norman*, 50 Cal. 634; *Good v. Combs*, 28 Tex. — ; *Hill v. Parker*, 36 Id.; *Wallace v. Howard*, 34 Id.; *Ballinger on Comm. Prop.*, 230, sec. 231.

There was no rule of law requiring the husband to exhaust the personalty before resorting to the realty. *Wenan v. Stengel*, 48 Tex. 384.

Where the husband sells, the purchaser need not see to the application of the purchase money. *Platt on Rights of Married Women*, 137; *Ballinger on Comm. Prop.*, 295.

If the heir has received his share of the estate or any

portion of it, this may be shown by the purchaser by way of defense. Platt on Rights Married Women, 135, 136, and citations; Connor v. Huff, 48 Tex. —.

FRANK W. CLANCY for defendants in error.

Our statute has never made any distinction between the rights of a surviving husband and those of a surviving wife. If there could exist any presumption in favor of the validity of a deed by a survivor of a community, this deed, on its face, overcomes any such presumption in this case. Comp. Laws, 1884, secs. 1410, 1411; Ballinger on Comm. Prop., sec. 222; Gale v. Davis, 4 Mart. 645; Chavez v. McKnight, 1 N. M. 147; Bennett v. Fuller, 29 La. 663; Bronsard v. Bernard, 7 Id. 222; Germand v. Gay, 9 Id. 580; Tugwell v. Tugwell, 32 Id. Ann. 852; Poutz v. Bistes, 15 Id. 636; Robinson v. McDonald, 11 Tex. 385; Thompson v. Cragg, 24 Id. 582; Kircher v. Murry, 54 Fed. Rep. 617.

No presumption can be raised to support the title of plaintiff in error. Ballinger on Comm. Prop., 243; 1 Dev. on Deeds, sec. 356.

The deed from the administrators of Antonio Sandoval is the common source of title in this case, and plaintiff in error can not question its validity. Jackson v. Brown, 10 Johns. 292; Jackson v. Streeter, 5 Cow. 529; Phelan v. Kelley, 25 Wend. 389; Jackson v. Walker, 7 Cow. 637; Weishurt v. Jones, 78 N. C. 361; Bank v. Harrison, 39 Mo. 433; Miller v. Hardin, 64 Id. 545; Roosevelt v. Hungate, 110 Ill. 595; McCrudy v. Lansdale, 58 Miss. 345; Horning v. Sweet, 27 Minn. 277; Griesler v. McKinnan, 44 Ark. 517; Stafford v. Watson, 41 Id. 17.

There is no evidence of any advancement by Miguel Montano to his daughter, Casiana. 2 Dev. on Deeds, 817.

SMITH, C. J.—It is claimed by defendants in error that Miguel Montano, on the fifth day of October, 1862, acquired title, by deed from Jose Serafino Ramirez, Tomas Caveza De Baca and Jose Manuel Gallegos, to a piece of land situated

in what is now the City of Albuquerque, he being at that time married to Clara Candelaria (the conveyance offered in evidence to show the acquisition of title is plaintiff's Exhibit 1); that a presumption of law arises, from the fact of acquisition during coverture, that the land became community property, and upon the death of Miguel Montano's wife, in April, 1868, title to an undivided half interest in said tract of land at once vested in the five children of the said Montano and wife, who survived their mother. Miguel Montano and two of those children, Candelaria and Ruperta, married respectively to Nicolas Lucero and Nicolas Apodaca, and their husbands, conveyed, by deed, dated January 27, 1882, a portion of said original tract to C. W. Lewis (defendant's Exhibit 2). Miguel Montano died on the 16th day of February, 1885. Thereafter, by subsequent conveyances, the part so conveyed to Lewis was conveyed to the plaintiff in error, Hattie E. Crary. This suit was originally brought on the twenty-first day of March, 1891, by Casiano Montano De Sanchez and Nicolas J. Sanchez, her husband, against the plaintiff in error and George F. Crary, her husband, to recover the land described in said deed from said Miguel Montano and others to the said Lewis (defendant's Exhibit 2). The said Casiano Montano De Sanchez was one of the five surviving children of the said Miguel Montano and wife. Said Sanchez and his wife died after the bringing of the suit, leaving, surviving them, an infant child, James Sanchez. The death of said plaintiffs having been suggested, it was ordered that the suit be revived in the name of Neill B. Field, executor of the said plaintiff Casiano Montano De Sanchez, and in the name of her son, James Sanchez, by the said Neill B. Field, his statutory guardian and next friend. The death of George F. Crary having been subsequently suggested, the suit proceeded in the name of the said Neill B. Field, as such executor, and said James Sanchez, by said Field, as his guardian and next friend, as plaintiffs, against the plaintiff in error, Hattie E. Crary, as defendant. The defendants, had, previous to the revival of said cause and the death of the parties, filed a plea of the

general issue to the declaration, and upon this issue the cause was tried, and no evidence was offered of the qualification of Neill B. Field as executor, nor was the last will and testament of his testator put in evidence to show that, as executor, he had any interest whatever in the property or the possession thereof. The only evidence in the record, besides the presumption of law, that the land alleged to have been conveyed by the persons who described themselves in the deed (exhibit 1) as executors of the estate of Antonio Sandoval, deceased, is the form in which the deed from Miguel Montano (exhibit 2), was executed. It is signed "Minor Heirs of Miguel Montano [Seal]," followed by the signatures of the two married daughters, who survived, as above stated, the death of their mother, and who united in this deed with their husbands. Upon the trial of the case, the plaintiff in error objected to the admission of Exhibit 1, purporting to be a deed from the executors of Antonio Sandoval, upon the grounds that the deed was not under seal, and that no authority from the probate court had been shown on the part of the grantors, as administrators or executors, to make said deed and convey title; that the probate court at that time had no power to authorize the making of said deed; and that, as the deed recited authority from the probate court preliminary to its admission in evidence, the authority should be shown. The court overruled the objection, and admitted the deed in evidence. No such authority from the probate court for the making of said deed was shown. It was attempted to be shown by witness Whiting, who had been probate clerk in the years 1869, 1870, and 1871, that he had found a book, which was produced on the trial, but not offered in evidence, and that was the only book of reference in the evidence, which book was labeled "Wills and Testaments," and that that book contained no such order or authorization in the probate clerk's office. No proof was offered that there had ever been any such record or order made, and that the record was lost. There is no proof in the record as to when Miguel Montano took possession of the said tract of land, except that the

evidence shows that he had a house situated on part of it, in which he lived, and was living there in the years 1864 or 1865. He may have been living there, for all the proof shows, long anterior to his marriage. There is also in evidence a deed from Miguel Montano to the said Casiano Montano De Sanchez, dated the second day of October, 1883, reciting that, in consideration of \$312, he thereby conveyed the land described in said deed. The witness Whiting testified that the land contained in the said deed, marked "Exhibit 8," above referred to, was a part of the tract mentioned in the said deed (Exhibit 1) to the said Miguel Montano, and that it was about half the original tract in area, and that in 1883, when this deed was executed, that and other pieces of land, parts of the original tract in possession of, and being disposed of by, the heirs of Miguel Montano, including the said Casiano, largely exceeded one-tenth interest in the whole tract. The records of the probate court, offered in evidence by plaintiff in error, show that Miguel Montano took out letters of administration on the estate of his wife on the twenty-second day of April, 1868, but they do not show that there has ever been any final settlement of said estate or any inventory thereof. All the records found in the probate court relating to this administration were produced upon the trial. See Exhibit 6. Upon the death of Miguel Montano, Nicholas J. Sanchez took out letters of administration, but the records of the probate court do not show that any inventory of assets or indebtedness was made, or that anything else took place except the mere granting of letters of administration; and there is no evidence as to the condition of the estate of the marriage community of Miguel Montano and wife as to the assets and debts at the time of her death, or subsequently, at the time of his. Upon the close of the trial, upon this state of the record, the court instructed the jury to find a verdict for the plaintiffs for an undivided one-tenth interest in the piece of land described in the declaration. Plaintiff in error filed a motion for a new trial, alleging that the verdict was contrary both to the law and to the evidence, which motion was overruled.

Assignments of error: "Now comes the plaintiff in error, and assigns as error committed by the court in the trial of said cause, by the court below, the following, to wit: First, The court erred in admitting in evidence, over the objection and exception of the plaintiff in error, Exhibit 1, the same being deed from administrators of the estate of Antonio Sandoval to Miguel Montano. (Page 15 of Transcript.) Second. The court erred in admitting, over plaintiff in error's objection and exception, the testimony of Nicolas Lucero as to the ownership of the land in question and adjoining lots. (Transcript, pages 16, 17, and 18.) Third. The court erred in similarly admitting the testimony of Major H. R. Whiting (Transcript, pages 26 and 27) in regard to book labeled 'Wills and Testaments,' said book not having been offered in evidence, and not being material if it had been offered, under the statement of counsel made at page 25 of transcript, and the testimony of the said Whiting not tending to supply any lost record of said court containing any order authorizing the sale of said property by the administrators of the estate of Antonio Sandoval, deceased, and no foundation having been laid by proof that any such record did exist. Fourth. The court erred in directing a verdict in favor of both plaintiffs in said cause, the evidence not showing any right in the executor of Casiano M. Sanchez, deceased, to recover. Fifth. The court erred in directing a verdict in favor of the plaintiffs in said cause, because there was evidence to go to the jury tending to show that Casiano M. Sanchez, deceased, the mother of the infant plaintiff, had received her full share of her mother's interest in the community estate of her deceased father and mother, Miguel Montano and wife. Sixth. The court erred in giving instructions to the jury to find a verdict for the plaintiffs, said verdict not being sustained by the evidence in said cause. Seventh. The court erred in many other particulars, apparent upon the face of the record."

It becomes necessary on the consideration of this cause to pass upon the rights of the children of Miguel Montano and

DECEDENT'S
estate: commu-
nity property:
rights of child in
estate of mother.

his wife, Clara Candelaria, to her estate, at the date of her death, during April, 1868; and, as our statutes as of same date do not declare upon such problem, we are constrained to ascertain the provisions of the civil law upon the subject of community property so far as they were operative in this territory when Clara Candelaria departed this life. See *Barnett v. Barnett* (decided at this term), 50 Pac. Rep. 337. It is declared in section 1, chap. 2, p. 32, Comp. Laws, 1865, that the laws heretofore in force concerning descents, distributions, wills and testaments, as contained in the treatises on these subjects written by Pedro Murillo De Lorde (Velarde), shall remain in force so far as they are in conformity with the constitution of the United States and the state laws in force for the time being. Article 49, chap. 4, sec. 1, of G. Schmidt's publication on the Civil Law of Spain and Mexico, is as follows: "Husband and wife are entitled to an equal share in the community, although one of them should at the time of marriage have been without any means. At the same time, both are liable in equal proportions for the losses and debts incurred during its existence." Article 67, sec. 4, chap. 2, of same work,

COMMUNITY prop-
erty: right of
surviving hus-
band to sell.

says: "On the death of the wife, the surviving husband acquires the absolute ownership and full administration of one-half of the matrimonial gains, and can freely dispose of the same, as well by contract inter vivos as by testament, without being compelled to reserve any portion thereof for the children of the marriage, provided he does not deprive them of their lawful portion." It is manifest that the interest of the heirs passes to them cum onere, with the burden of the debts created during the coverture of their parents, and that though said interest may be an absolute right, and attached at the moment of the death of their immediate ancestor, it is nevertheless indispensable that authority should exist to take charge of the community property, and administer it for the payment of the debts to which it was subject. In recognition of this status, the surviving husband is authorized by the civil

law of Spain and Mexico to sell as much of the community property as may be necessary to pay the community debts, and, in the exercise of this right and discharge of this duty, any transfer of property made by him, be it personal or real, conveys a good title to his vendee, and the heirs are without authority to interfere with or restrain him in his action, as survivor, unless it shall appear that he is prostituting his power, and committing waste, to their detriment. Such were the obligations, and such the privileges, of the surviving husband, under the civil law of Spain and Mexico. On September 22, 1846, by the Kearney Code, it was provided that prefects shall grant letters testamentary and of administration; and on the twelfth day of January, 1852, an act of the legislature provided for the administration and distribution of the estates of decedents. It is plain that these acts were intended to provide against the abuse of power by the surviving consorts, to increase their efficiency by specific directions to them as to their duties, by requiring them to give a good and sufficient bond for an honest execution of their trust, and to make an accurate inventory of the community property. It can but be recognized that such conditions were imposed for the good of those whose interests were committed to them. It can not be properly contended that a surviving husband was by such requirements abridged in his power derived from the civil law to administer the community estate; and as there is no statute in this territory restricting him, when qualified according to statute, from proceeding to settle up such estate to the extent of paying its debts, we will consider him, notwithstanding the foregoing statute, not less authorized to dispose, as survivor, of the community property for the payment of the community debts, than he was under the civil law.

It appears that Miguel Montano qualified as administrator of the estate of his wife on the twenty-sixth day of April, 1868, and that he remained in possession of the community property without interruption or objection continuously from that date until January 27, 1882, when he conveyed a part of the

COMMUNITY prop-
erty: failure to
apply proceeds to
payment of com-
munity debts.

property to one C. W. Lewis, and that on the second day of October, 1883, he parted with another portion of the property by deed to Casiano Montano De Sanchez; but it is not shown in either case in what capacity he was such grantor, nor does it seem material whether he acted as survivor or administrator, as the presumption must be that he was realizing for the purpose of discharging the community debts. If he acted as survivor, his right under the civil law was undisputable; and if as administrator, he was duly authorized, and his transfer of the title was valid. That it is not shown of what the community property consisted, that it is not shown that the portion of it sold was for the discharge of the community debts, that it is not shown that the proceeds of the sale were applied to the payment of the community debts, can not affect or destroy the rights of the bona fide purchaser for value. If Montano were abusing his trust as survivor, he should have been restrained by those whom he was wronging; and, if he were exceeding his authority as personal representative, redress should have been sought upon his bond. That Casiano Montano De Sanchez recognized the right of her father to sell the community property is manifest; that she became purchaser of a part of it from him is not less true; and that this action of hers, and the payment of purchase money by her, indicate her approval both of the propriety and power of his conduct, in connection with her sisters, of converting a part of the same property into cash, may be logically claimed; and that she was cognizant that the proceeds were rightly used, either in payment of the debts of the community, or in the distribution among the parties entitled, may be fairly inferred from her failure for many years to assert any antagonistic rights in the premises. It may be justly suggested that she acquiesced in the proceedings of her father at the time of their performance, as it does not seem to have occurred to her until after a long interval of time that her interests had been ignored and sacrificed.

May it not be claimed that, as there had not been any sale of the community realty for fourteen years, the surviving

spouse and the children continued to hold it as community property, and that all the parties acquiesced in such situation, and are now estopped from impugning it? It appears in article 57 in the publication of Schmidt on the Civil Law that "the dissolution by death takes effect from the moment of its occurrence, although heirs of the deceased spouse continue to live with the survivor." The following article (58) says: "But though in such case the community has ceased to exist, a new one may be created between the said heirs and the survivor if they continue to keep their property in common, but in such event the gains and losses are apportioned among each in proportion to his (or her) share," etc. That Miguel Montano, as surviving partner, was authorized to dispose of the community property for the purpose of paying the debts of the community, is established by abundant authority. In *Lang v. Moody*, 2 Tex. Land Rep. 378, the court, in considering the question now under advisement, said: "Under the repeated decisions of this court, it must be held as conclusively settled that the survivor of the marriage relation, without administration upon the estate of the deceased member in any other mode expressly provided by statute, has power as survivor to sell the community property for the purpose of paying the debts which are a charge upon it." In *Rudd v. Johnson*, 60 Tex. 91, it is declared that "the husband, after the death of of the wife, may sell the community property for the purpose of paying the community debts, without first qualifying as survivor in community." In *Ballinger on Community Property* (section 230) it is declared that "it is the duty of the survivor to wind up the affairs of the community, and liquidate the debts. The right of the survivor to make sales of the community property would seem to be the necessary consequence of the obligation of such survivor to discharge the debts of said partnership." In section 231 the same author says: "If there be community debts, the survivor may appropriate community property for their payment, and has power to wind up the community affairs. It is so recognized that sales fairly made by him for that purpose will not be set aside.

Where sales are made by the survivor without qualifying under the statute, the purchaser is not bound in his own protection to see that his money is applied to the payment of community debts. Where community debts exist, the survivor has the same power to sell or incumber the community homestead, and liquidate them, as he has of any other community property; and he may do this without qualifying under the statute. The survivor has the power to administer the community for the purpose of paying the community debts without hindrance on the part of the heirs, although they may prevent by injunction the survivor from applying the community property to the other uses than liquidating debts." Says the same author in section 224: "The administration of the succession involves with it that of the community, and the administrator may rightfully cause community property to be sold to pay debts of the succession, and the wife or her representative can claim nothing until the debts are paid." Says the same author, in section 225: "It is held in *Hawley v. Bank*, 26 La. Ann. 230, that 'upon the dissolution of the community by the death of the wife, the responsibility of the husband is not changed. He is absolutely and personally bound for their payment, and his separate property may be seized for their acquittal; hence the community property is justly under his control until the debts are paid. Before the final settlement and discharge, heirs have no absolute right to the property of the community that can be legally recognized. Their interest in it continues contingent and uncertain until, by the result of the final settlement of all the obligations of the community, it is known whether or not there are assets remaining for partition between the survivor and the heirs of the deceased.' The respective interests of the survivor and heirs of the deceased spouse may attach at the moment of the dissolution of the community, but they are so subject to the payment of the community debts that they can not be recognized as certainly substantial." The following is from Ballinger on Community Property, as to the Spanish Law (section 230, p. 293): "Qualified powers of management and dispo-

sition of the community estate are possessed by the survivor, and take effect immediately upon the dissolution of the community, but the absolute power of management and disposition is acquired only when the survivor qualifies as provided by the statute; and, by such qualification, the survivor is vested with the same power and discretion in the execution of the trust thereby as the husband had during life to manage, control and dispose of the common property as the head of the connubial firm. On the death of either spouse, the decedent's estate becomes entitled to one-half of the community property; but the heirs can claim and finally hold only such portion as may remain after the payment of all the just debts and demands against the community." In *Cook v. Norman*, 50 Cal. 633, the court, in passing upon the right of the surviving husband to sell the community property for the payment of debts, said: "The principal question, however, is whether a purchaser in good faith from the surviving husband, under such circumstances, is bound to show, in order to support his title as against a child of the community, that the sale of the premises conveyed to him was, in point of fact, necessary to provide for the payment of the community debts; and this question must, we think, be answered in the negative. The authority to sell the property of the community belongs to him as a survivor of the community, and is the same in its nature as was his power to do so during the existence of the community. The death of the wife did not deprive him of his power in this respect, and the purchaser dealing with him in good faith acquired a title valid in point of law, as though the community had not been dissolved." Febrero declares that "there must be deducted all legitimate debts which the husband or wife with his permission, or both jointly, may have contracted on account of the conjugal partnership, and which must be paid out of the ganancial property, and that the residue is only divisible, and is what is called the 'inheritance.' " Febrero Novissimo, vol. 6, p. 124. Says Ballinger on Community Property (section 232, p. 297): "As

against purchasers, after a great lapse of time, the authority to sell will be presumed; in other words, the sale will be presumed to have been made for the purpose of satisfying community debts." Says Ballinger (section 231): "Where sales are made by the survivor without qualifying under the statute, the purchaser is not bound, in his own protection, to see that the purchase money is applied to the payment of community debts." It has been repeatedly adjudicated in Texas that "upon the death of one of the spouses, the community estate passes to the survivor, charged with the community debts, and is liable to be sold by such survivor under execution to satisfy such debts. The deceased's portion descends to the children, subject to the right of the survivor to use it in payment of such charges, and the right of creditors to enforce upon it their community demands." The same authorities say: "And it would seem that when those interested in an estate interpose no objection to the management and control of the community estate by the survivor without qualification under the statute that purchasers from the survivor, if there be community debts bearing a reasonable proportion to the value of the property sold by the survivor, ought not to be disturbed in their titles acquired in good faith. In the absence of such interposition, purchasers may well believe that those interested in the estate are content that the survivor shall exercise the powers which he possesses to sell property to raise means with which to discharge debts which are a charge upon such property."

It seems needless to multiply authorities to establish the conclusion that, under the civil law, the spouses own no specific part of the community estate before its dissolution, and that they do not acquire, by death or other separation, severalty in any specific part, until the charges and expenses to which it may be subject have been satisfied, and partition effected. Liquidation of the community estate may be demanded and forced, but no specific property can be claimed, the interest of the heirs being residuary in one-half of the

remainder after the payment of the debts. It does not appear that the husband was divested of his control over the community estate for the payment of its debts by any legislative act in existence at the time of the death of Clara Candelaria. The statute directing administrations, and declaring the distribution of the inheritance, does not, either expressly or by implication, modify the status of the heirs at the death of their mother. The one prescribes the qualifications of the administrator, and the other apportions the estate after the payment of the debts for which it is liable. In *Leatherwood v. Arnold*, 66 Tex. 416, 417, the court, speaking through Robertson, J., in clear and concise terms, outline the powers and duties of the survivor, under the statute: "By qualifying under the statute, the survivor acquires over the whole community estate the same right of management, control and disposition passed by the managing partner during the life of the partnership. He is a trustee of a unique character, being the owner in his own right of one half of the trust estate." "Trustees must generally account for every item of the trust estate, but the responsibility of the survivor can only be fixed by aggregates. Inquiry into the details of his administration is inconsistent with the breadth of his power and discretion. It is debited with the value of the estate and its revenue, and credited with disbursements, and must account to creditors or distributees for the remainder."

"The power possessed by a surviving husband or wife, who qualifies to administer a community estate, is much broader than that possessed by an ordinary administrator; and what such a survivor may legally do, in the exercise of that power, will bind the estate." *James v. Turner*, 78 Tex. 244. That the Spanish law, as hereinbefore announced, as to the property rights of married persons, prevailed in 1868, in the territory of New Mexico, is our conclusion; and that its application to this case is consonant with justice seems palpable.

It does not appear that the property involved was not sold for an adequate consideration to pay the community debts.

COMMUNITY prop-
erty: sale: pur-
chaser's title:
legal presump-
tions.

It is not pretended that there was collusion or fraud in the disposition of it by Montano, or that the contract value was paid. It does not appear that the proceeds were not properly applied. It is not shown that, if Clara Candelaria did not receive a proportion of the said proceeds, even if sold for partition, the community estate has been so administered and distributed that she can not procure her share of it without damage to an innocent purchaser; nor is it shown that, if she has been deprived of her rights, she can not secure redress upon the bond of the administrator. The presumptions of the law, not having been repelled, must be applied, and they seem to preclude a reasonable doubt that the title of the plaintiff in error is paramount, and must be sustained.

We do not deem it necessary to consider any other issue presented by opposing counsel. The judgment of the lower court is reversed and remanded for a new trial of this cause.

Laughlin, Hamilton and Bantz, JJ., concur.

[No. 672. October 2, 1897.]

JOHN BOYLE, JR., Appellant, v. MOUNTAIN KEY
MINING COMPANY, Appellee.

MINES AND MINING—LIEN—SUPERINTENDENT'S CLAIM—COMP. LAWS, SEC. 1520 — STATUTORY CONSTRUCTION — ENTIRE CONTRACT. — 1.
Held: That the superintendent and general manager of a mine, who has merely the management of the mine, and does not actually perform any bodily labor upon or in it, is not entitled to the benefit of section 1520, Compiled Laws, giving to every person performing labor upon or in a mine a lien upon the mine.

ID.—2. Held: That the superintendent's claim, being for a fixed sum for all his services, part of which were not within the scope of the statute, supra, is void in toto.

Appeal, from a judgment for defendant, from the Fifth Judicial District Court, Socorro County. Affirmed.

The facts are stated in the opinion of the court.

WARREN, FERGUSSON & GILLET for appellant.

The contract was entire it is true, but it included in its terms only such services as were properly in the line of the duties of a superintendent. Even if he performed other work for the company, that can not affect the construction of the contract itself. The contract is plain, and contemplates only services which the master rightly finds are entitled to a lien. *Capron v. Strout*, 11 Nev. 304; *Mining Co. v. Cullens*, 104 U. S. 176.

Such statutes are to be liberally construed. *Mining Co. v. Strout*, *supra*. Our statute (Comp. Laws, sec. 1520) is very similar to that of Utah, on which this last decision is based.

JAMES S. FIELDER for appellee.

Statutes authorizing mechanics' liens are in derogation of the common law, and must be strictly construed. *Minor v. Marshall*, 6 N. M. 195; *Finane v. Hotel & Improvement Co.*, 3 N. M. 256. See, also, *Davis v. Alvord*, 94 U. S. 545.

The provisions of the statute, requiring certain prerequisites to entitle the claimant to a lien, must be strictly complied with; and a failure to comply with one is equally as fatal as a failure to comply with all of these provisions. *Phil. on Mech. Liens*, secs. 356, 357; *Minor v. Marshall*, *supra*; *Lynch v. Cronan*, 6 Gray, 531; *Davis v. Livingston*, 29 Cal. 283; *McWilliams v. Allen*, 45 Mo. 573; *Graves v. Pierce*, 53 Id. 428.

Where a non-lien claim is mingled with a lien claim, and there is no way to distinguish the amount of each, it has been held there is no lien. *Phil. on Mech. Liens*, sec. 355; *Jones v. Walker*, 43 N. Y. Sup. Ct. 354.

The general manager of a mine, who occasionally inspects the workings of the mine and gives general instructions

to the foremen is no more entitled to a lien than would be the owner, in whose shoes he stands. *Smallhouse v. Kentucky, etc., Co.*, 2 Mont. 443; *Mining Co. v. Cullin*, 104 U. S. 176.

SMITH, C. J. —This action was instituted in the district court for Grant county on the tenth day of December, 1892, by John Boyle, Jr., the complainant, against the Mountain Key Mining Company, a corporation; and other persons, herein designated as "Charles Silva et al.," were also made defendants, they claiming an interest in the Mountain Key Mine, upon which complainant sought by his bill to establish a lien for work and labor performed thereon, as provided by section 1520 et seq. of the Compiled Laws of New Mexico. Prior to the institution of this action, to wit, on the twelfth day of March, 1892, the defendants Charles Silva et al. obtained a decree in a suit which they had formerly instituted against the Mountain Key Mining Company, establishing their claims of lien, respectively, for work and labor performed on the Mountain Key Mine, against the said company and said mine; and on the twelfth day of March, 1892, the said Mountain Key Mine was sold by John M. Ginn, a special master, under said decree, and purchased by Battista Gaudina, one of the defendants herein designated as "Charles Silva et al.," and the deed of the special master upon said sale was approved by the chancellor of the Third judicial district court on the fourteenth day of May, 1892. Gaudina was in possession of the Mountain Key Mine by virtue of his purchase and deed at the time this suit was instituted by the complainant, John Boyle, Jr. On the thirteenth day of June, 1893, William Walker and James S. Fielder, having acquired title to the said mine by purchase from Gaudina, intervened as defendants in this cause. On the thirtieth day of October, 1893, the hearing of this cause was begun before A. H. Harlee, as special master. On the twenty-eighth day of April, 1894, the special master filed his report in the court below. Objections were filed by the solicitor for the complainant, and also

by the solicitor for the defendants Charles Silva et al. and the interveners, to the report of the special master, and exceptions to the confirmation of the report by the chancellor. Both were overruled, and the report was confirmed by the chancellor on the first day of December, 1894. The claim of lien which the complainant sought to establish against the Mountain Key Mine is in words and figures as follows:

“Lien Claim. To Whom it May Concern: Notice is hereby given: That I, John Boyle, Jr., have a demand against the Mountain Key Mining Company, a corporation doing business under the laws of the territory of New Mexico, in the sum of five thousand, two hundred and seven dollars (5,207), after deducting all just credits and offsets. That the said indebtedness arose for work and labor done and performed at the times and in the manner, terms and conditions following: That, heretofore, to wit, on the first day of November, A. D. 1888, the said Mountain Key Mining Company, then and there being the owner and in the possession and operation of that certain mine and mining claim known as the ‘Mountain Key Mine,’ situated in the Pinos Altos mining district, in Grant county, New Mexico, a more full and complete description of which will be found in the deed of the same to said company as the same is recorded in Book of Deeds No. 20, at pages 339 and 340, of the office of the probate clerk and ex officio recorder of said county, to which reference is hereby made, and was also the owner and in the possession and operation of certain machinery, appliances, and improvements situated upon said property, hereinafter described. That on the said date, to wit, the first day of November, A. D. 1888, the said Mountain Key Mining Company employed the undersigned, John Boyle, Jr., to work and labor upon said mine and mining claim for the said company, in the capacity of superintendent. That he should superintend the mining and abstracting of ores, the digging of tunnels, the sinking of shafts, the employment and discharge of other laborers of said company in and about the work and labor performed upon said mining claim, and such other services as were usual and

customary to be done and performed by mining superintendents. That the undersigned should be paid for the work and labor so done by him the sum of two hundred and fifty dollars per month for each and every month, payable at the end of each month. That pursuant to the terms and conditions aforesaid he entered the employ of the Mountain Key Mining Company, and performed the work and labor to be performed by him upon said mining claim as aforesaid, from the first day of November, A. D. 1888, to the first day of September, A. D. 1891, being the period of thirty-four months, at the monthly wages of two hundred and fifty dollars, a total of eight thousand, five hundred dollars due the undersigned for work and labor. That the said company has paid to the undersigned on account of said labor the sum of three thousand, two hundred and ninety-three dollars (3,293), at various times and in various amounts, and the balance claimed is the sum of five thousand, two hundred and seven dollars, which now remains due and unpaid and which the said company has failed and refused to pay. That the said contract of employment was made by said company, acting through its president, John Boyle, on or about the first day of October, A. D. 1888: Now, therefore, in consideration of the premises, I, the undersigned, John Boyle, Jr., do hereby claim a lien upon said property known as the 'Mountain Key Mine,' hereinbefore described, and also upon the improvements thereon situated, to wit: One blacksmith shop, and tools thereunto belonging; one ore house; one set of scales; five dwelling houses; one boarding house; one assay office; the hoisting plant, consisting of hoisting house, hoist engine, boiler, pump, derrick, cars, skip, cables, tee rail, and all other machinery, appliances and improvements used in the operation of said mining claim, for the said sum of \$5,207, for the work and labor done and performed upon the said property. John Boyle, Jr.

"Territory of New Mexico, County of Grant—ss.: John Boyle, Jr., being first duly sworn, on his oath says that he has read the foregoing claim of lien, and understands the contents

thereof, and that the facts therein stated he knows of his own knowledge to be true. John Boyle, Jr.

“Subscribed and sworn to before me this 15th day of September, A. D. 1891. E. M. Young, Probate Clerk. [Seal.]”

Marginal: “Lien. J. Boyle, Jr., vs. Mountain Key Mining Company. Filed for record September 15th, 1891, 2:50 p. m. A. M. Young, Probate Clerk, by E. Cosgrove, Deputy.”

It appears that the lien claim of complainant was filed before that of defendants Silva et al., and it has, by virtue of such recordation, priority in right, if it can be otherwise maintained. “Qui prior est tempore potior est jure,” unless the lien be intrinsically defective. The master reports as follows: “It is shown by the evidence that, during the entire period complainant performed said labor under said contract, complainant was general manager and superintendent of the business of the said Mountain Key Mining Company, which consisted of mining in said Mountain Key Mine, and the milling and reduction of ores taken from said mine at a mill owned by said company, situated about two miles from said mine, and in such capacity, besides superintending the operation and development of said mine, superintended the operation of said mill and the treatment and reduction of ores at said mill; superintended the transportation of ores from mine to mill; received the bullion and concentrates from said mill, and shipped the same; kept the books of the company; employed and discharged labor at mine and mill, and paid for such labor; assayed the ores, or pulverized and prospected the same with horn spoon; assisted in cleaning up and retorting the gold; purchased supplies; managed the boarding house maintained by said company in connection with said mining and milling, in other words, had general management of the affairs of said company.” And he further says: “The evidence shows that complainant was a mining engineer; that he kept a plat of the mines, showing the progress of the development work in said mine; that he resided at said mine, visited and personally inspected the same as occasion required; that he at such times

took ore from said mine with view of testing the same; that during his entire service the foremen of said mine were subject to his orders, and worked under his direction." That the complainant was the general agent and superintendent of the Mountain Key Mining Company; that he attended to all their

MINES: lien: superintendent's claim: Comp. Laws, sec. 1520: statutory construction.

business; that he directed the conduct of the mine, the mill and all the appurtenant operations; that he was the representative of the company, with absolute and plenary power, is indisputably established, and it devolves upon us to determine whether, as such official, he is within the statutes of the territory designated "Liens." Section 1520 of such title declares that: "Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct to create hydraulic power or any other structure or who performs labor in any mining claim has a lien upon the same for the work or labor done or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building, or other improvement or his agent; and every contractor, sub-contractor, architect, builder or other person having charge of any mining or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purposes of this act." The supreme court of the United States has practically construed this provision in *Mining Co. v. Cullins*, 104 U. S. 176, as the statute of Utah therein considered is substantially similar. In this case it was decided that a person hired by the owners of a mine in Utah to oversee the miners, and generally to control and direct the working and development of the mine, and who did, in the performance of his duties, some manual labor, was entitled to a lien for the wages due him. Says Mr. Justice Woods, who delivered the opinion of the court: "The finding of the district court makes clear the character of the services rendered by the defendant in error.

He was not the general agent of the mining business of the plaintiff in error. That office was filled by Patrick. He was not a contractor. His services were not of a professional character, such as those of a mining engineer. He was the overseer and foreman of the body of miners who performed manual labor upon the mine. He planned and personally superintended and directed the work with a view to develop the mine and make it a successful venture. His duties were similar to those of a foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor. They require the personal attention and supervision of the foreman, and occasionally, in an emergency, or for example, it becomes necessary for him to assist with his own hands. They can not be performed without much physical exertion, which, while not so severe as that demanded of the workmen under his control, is nevertheless as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of them may well be called work and labor, and that the district court rightfully declared the person who performed them entitled to a lien under the law of the territory." It is manifest that had the person before the court been either a general agent of the mining business, or a mining engineer, he would have been excluded from the privileges of the statute, as it must be recognized that in the specification of the services rendered by the lien claimant, in contradistinction with those of others of a character more extensive and skillful, it is implied that the latter could not by any construction be embraced within the terms or spirit of the law. It can but be conceded that such inference is immediate and conclusive. In *Smallhouse v. Mining Co.*, 2 Mont. 445, Wade, C. J., in rendering the opinion, observed as follows: "From the nature of the plaintiff's

employment, as averred by himself, it does not appear that he was an architect or laborer, or that he labored directly in the construction of the buildings, etc., but rather that he was employed by the corporation, at a fixed salary, to manage and superintend its affairs at the place named. Undoubtedly, he had the general oversight of the business of the company, of the workmen employed to labor upon the buildings, etc., and probably kept an account of their time, saw that they performed good service and earned their wages, and at stated times paid them their money, for all of which he rendered an account to the company. His services were useful and necessary, but they contributed only in an indirect manner to the construction and erection of the buildings. He stood very much in the situation of an owner directing and managing works of his own. He was the representative of the corporation, and to the laborers under him he was the corporation, at the place where the labor was performed. This was not the kind of service that entitles one to a mechanic's lien. This superintendent stands in the place of the corporation, and to give him a lien for the kind of labor he performed might defeat the liens of the workmen and materialmen who actually constructed the building, and would be like giving a lien to the corporation itself." In *Railway Co. v. Baker*, 14 Kan. 563, Brewer, J., declares clerks, timekeepers, superintendents, and that kind of employees, are not within the scope of an act to protect laborers, mechanics and others in the construction of railroads. He says: "Doubtless this term ["laborers"] is often used in an enlarged sense, as embracing all persons who perform any kind of labor, physical or mental. In that sense, any professional or literary man is a laborer; and in that sense Baker, as 'timekeeper' and 'superintendent,' was a laborer. But it is very apparent it was not used in any such sense here. If it were, the succeeding term of description, 'mechanics,' would be superfluous; for a mechanic is, in that sense, unquestionably, a laborer. Indeed, the terms of description associated with this clearly indicate its meaning. 'Noscitur a sociis.' These show that it is here used in its more

common acceptation, and in accordance with the definition as given by Webster, as follows: 'Laborer. One who labors in a toilsome occupation; a man who does work that requires little skill, as distinguished from an artisan; sometimes called a laboring man.' " That our statute imports the physical signification of labor is conclusively established by the connection in which it is employed. Its terms are, "Every person performing labor upon or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done." The enumeration in this section includes some subject upon which no work not exclusively manual could be performed, and, *ex vi termini*, excludes any construction of "labor" not interpreting it in its usual acceptation. The work or labor must be *ejusdem generis* as to all the structures.

In *Railroad Co. v. Leuffer*, 84 Pa. St. 171, it is declared that a civil engineer is not a laborer or workman, within the meaning of the acts giving to contractors, laborers, and workmen liens upon the property of railroads for the value of services rendered in the construction. Mr. Justice Gordon says: "Whether the plaintiff can maintain his claim against the defendant depends upon whether he can bring himself within the class designated in the statute as 'laborers and workmen.' We are, then, to inquire what the legislature intended by the use of these words. In seeking for this legislative intent, we must give the language of the statute its common and ordinary signification. But ordinarily these words can not be understood as embracing persons engaged in the learned professions, but rather such as gain their livelihood by manual toil. When we speak of the laboring or working classes, we certainly do not intend to include therein persons, like civil engineers, the value of whose services rests rather in their scientific than in their physical ability. We thereby intend those who are engaged, not in head, but in

hand work, and who depend upon such hand work for their living." The justice proceeds, after citing various authorities, as follows: "We can not doubt but that the terms 'laborers' and 'workmen' were intended to include such only as were engaged in manual occupations. Thus we may see that in these, as in many other cases which we might cite, this limited sense has been given to the words 'laborers,' 'workmen,' 'servants,' and the like; and this for the very obvious reason that in all statutes of this kind the intent has been to protect a class of persons who are wholly dependent upon their manual toil for subsistence, and who can not protect themselves. This same result was reached in the very recent case of *Wentroth's Appeal*, 82 Pa. St. 469, in the construction of the act of April 9, 1872, per Mr. Justice Sharswood. It is true, in one sense the engineer is a laborer; but so is the lawyer and doctor, the banker and corporation officer, yet no statistician has ever been known to include these among the laboring classes. We can not, therefore, even to save a meritorious claim, undertake to make a new classification which must necessarily defeat the statutory intent."

That the complainant was interested as an investor in the Mountain Key Mine seems palpable, and that he was the agent of the company, empowered to employ and discharge the laborers in all the branches of the business, is admitted, and it does not seem legitimate that there should at the same time be combined in him the position to secure for himself preference over the subordinate chosen by him. In *England v. Piano Co.*, 41 N. J. Eq. 470, 4 Atl. 307, it is adjudicated that the president of a manufacturing corporation is not entitled to the lien given to laborers in the employ of an insolvent corporation for what he earns while serving the company as president. Says Bird, V. C.: "The spirit of the act is manifestly to pay 'laborers,' doing labor or service of whatever character for, or as workmen or employees in the regular employ of such corporation, and not to give a preference to the individual members of the corporation; and not that they may employ themselves, and maintain both attitudes, employer or employee,

as their individual gain and the loss of creditors may dictate. And, as to the public policy of so extending the construction as is urged, let it be considered how strong the inducement, as well as how convenient, for every director to be employed 'doing labor or service as a workman or employee' for his company; and let it also be considered what a prolific source of injustice and fraud such construction would prove to be. There are numerous considerations in this direction which will arise to the mind of the thoughtful." In *Blakey v. Blakey*, 27 Mo. 39, it is held that a superintendent can have no lien for services rendered in superintending his own workmen, and the court comments as follows: "The law gives the mechanic, builder, artisan, workman, laborer or other person who may do or perform any work upon or furnish materials for any building a lien on the same, to secure the payment of the work done or materials furnished; but it has no such elastic power as is claimed for it in this case, and it can not be stretched to cover, besides the value of the work done and materials furnished, a claim for services performed by the builder for himself in superintending his own workmen." In *Raeder v. Bensberg*, 6 Mo. App. 445, it is declared that an architect has no lien for his services in drawing plans and specifications and giving general directions to the builder under whose special superintendence the building was erected. Says Bakewell, J., who delivered the opinion of the court: "Plaintiff's claim is for services rendered, not in a mechanical capacity, but purely as an architect. We are of opinion that the mechanic's lien law was not intended to extend to such services. A mechanic who acts as an overseer whilst performing manual labor does not lose the lien given him for his mechanical services because he also acts as an overseer; but an architect is not a mechanic, nor ejusdem generis, and his services in drawing plans and specifications and giving directions to the builder under whose special superintendence the house is being erected can not be called, in any proper sense of the word, 'work or labor upon the building.'" In *Nelson v. Withrow*, 14 Mo. App. 276, Thompson, J., says: "The contract, when put in evi-

dence, discloses the fact that the item was not alone for carpenter work, for which the law gives a lien, but that it was also for superintending, for which the law gives no lien." In *Murphy v. Murphy*, 22 Mo. App. 22, Thompson, J., declares: "The law gives no lien against a building for superintending the construction thereof." The New York statute gives the lien to "any person who shall perform any labor in building any house," etc. It is held that these words do not give a lien to one who, as an architect, superintends the erection of a house. *Stryker v. Cassidy*, 10 Hun. 18. In Kentucky it is held that the architect or superintendent of a building has no lien, the character of his services not being such as is embraced within the provisions of the statute giving liens to mechanics, laborers and materialmen. *Foushee v. Grigsby*, 12 Bush. 76.

It seems demonstrated by the foregoing adjudications, the general principles they enunciate, and the specific conclusions they announce, that the plaintiff in error, "general manager and superintendent of the Mountain Key Mining Company," a "mining engineer," who never performed any bodily toil, but directed all the operations of his company, who was the representative and practically the company at its place of business, was employed for his professional knowledge and executive capacity, and not for his strength and fitness to work, and is not, therefore, within the beneficence of the statute enacted, it is claimed, for the security of a class presumably not otherwise able to protect themselves. If not absolutely a part of the company, as a member, he was its authorized agent to act for it in every capacity essential to the development of its property and the realization of profits; and to permit him to utilize his position to procure a preference over the laborers he employed and controlled would frustrate the object of the statute, and promote oppressive injustice. It may be further observed that the compensation agreed to be paid to the superintendent suggests conclusively that he was engaged for his supposed scientific qualifications to supervise and direct a mining enterprise, and not for his worth as a hand upon or in a mining claim. Three thousand dollars per annum is an

excessive consideration for any service, if limited to the overseeing of a few laborers in a small mine. It appears, in the lien filed, that he was employed to work and labor upon the mine and mining claim, not manually, but in the capacity of superintendent, and for such other services as were usual and customary to be done, not by miners, but by mining superintendents. It is not necessary to determine whether there is any distinction between a mining superintendent and the superintendent of a mine, but it is not difficult to conceive that the one is more comprehensive than the other, that the one indicates the possession of the qualifications, by education, to direct all the operations of mining business, and the other fitness, by experience, it may be, for conducting the development of a mine only. It is not strained to consider one the superintendent for a mining company, and the other superintendent of a company's mine only. A railroad superintendent is the superintendent for a railroad company of the entire line, and the superintendent of a division is the subordinate in charge of a portion of the line.

We might with propriety forbear the consideration of any other proposition in the premises, as we deem the foregoing position decisive; but we will briefly supplement it by passing upon the contract, whether it is entire or severable. That the plaintiff in error superintended the mine, the mill, the boarding house; that he employed and discharged the laborers; that for this "work and labor so done by him" he was promised the sum of \$250 per month, is distinctly alleged by him; and that attention to the mill, the boarding house, and the laborers was not the addition of labor to the mine will not, it is presumed, be contended. In *Barnard's Adm'r v. McKenzie*, 4 Colo. 251, it is declared that the statute contemplates a lien only for such labor as may have been performed in the development and improvement of the mine—which has been incorporated with it and constitutes a part of its value. Says Elbert, J.: "The lien provided for by section 4 [substantially the same as our statute], above quoted, is for work and

labor 'in or upon any mine, lode or deposit,' and for materials furnished 'to be used in or about any mine, lode or deposit.' This language fixes clearly the relation which the work and labor must sustain to the property sought to be charged. It contemplates only such labor or material as has been performed and furnished in the development, improvement, or conservation of the mine, which has become incorporated with the mine and constitutes a part of its value. To give a lien for work or labor not performed, in the language of the section, 'in or upon the mine,' would not be construction, but judicial legislation." The services were rendered under one contract for a specific salary, and it is impracticable to make any apportionment upon the basis of a quantum meruit. No allotment of the amount due can be applied to the respective occupations. "If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." 2 Pars. Cont., p. 519. It is well settled that a lien account which so mingles items for which the law gives no lien with those for which a lien may be had that they can not be separated upon a mere inspection is void. In *Baker v. Fessenden*, 71 Me. 292, the court says: "Thus, if the plaintiff might legally have had a lien for a portion of his labor, he has so intermixed and interwoven it with that for which he has shown none that it is utterly impossible for the court, and probably for the parties, to make any such distinction between the two kinds as to authorize a lien judgment for any definite amount." In *Edgar v. Salisbury*, 17 Mo. 271, it is decided: "Where, in a demand filed by a person seeking to avail himself of the benefit of the act concerning mechanic's liens, services for which he might have a lien are combined with other charges, for which no lien is given, and the whole summed up in one item so that it is impossible to ascertain from the account filed how much of the gross charge is a lien, the party will lose the whole benefit of the act." In *Nelson v. Withrow*, 14 Mo. App. 270, it is declared that "an account filed as the foundation of a mechanic's lien, which contains a

lumping charge, including an item for which no lien is given, will not support a lien." Says Thompson, J.: "The reason of this ruling is that the owner of the building has the right to know, from the account filed, the amount which, under the law, has become a charge upon the property, in order that by paying or tendering this amount he may discharge the property of the incumbrance." In *Mining Co. v. Smith*, 1 Or 171, it is declared that "claims for anything but labor and materials are evidently non-lienable, and can not, therefore, be embraced in a judgment for a lien." In *Adler v. Exposition Co.* (Ill. Sup.) 18 N. E. 811, Craig, C. J., states: "The entire sum named—the \$5,000—is to be paid for the entire amount of labor to be performed under the contract. The result is, as an entire contract, it can not be enforced in this proceeding, for the reason that no lien is given for a part of the labor to be performed under the contract. On the other hand, the contract can not be enforced as to that part of the labor performed for which a lien is conferred by the statute, because the contract is entire, and an entire contract can not be apportioned, and the performance of it enforced in fragments." *Crosby v. Loop*, 14 Ill. 330. That the superintendence of the mill and boarding house was part of the consideration for the \$250 promised the plaintiff in error for his services is forcibly indicated by the admission, sworn to by him, that his salary was increased after the said establishments were put in operation. For additional responsibility, and enlarged demands upon his time and skill, it was legitimate that he should require an advance in his allowance. It is not without significance that the plaintiff failed to specify in his "lien claim" the services performed under the provision for "such other services as were usual and customary to be done by mining superintendents;" but it is immaterial whether the omission proceeded from an appreciation of the consequence of such detail, or from inability to make an apportionment. The claim is for a fixed sum for all his services, and, being in part, at least, for such as are not within the scope of the statute, is void in toto.

A few observations upon the origin and object of the mechanic's lien statutes may not be inappropriate. Writers recognized as standard and respected tribunals, including the supreme court of the United States, have declared that such enactments were induced by the consideration that the value of the property to which the labor and materials have been applied has been enhanced; that, the labor and materials being incorporated in the structures, the land thus improved should be subject to an equity in favor of those who furnished them. Says Mr. Justice Field in *Davis v. Alford*, 94 U. S. 547: "The statute was designed to give security to those who, by their labor, skill and materials, add value to property, by a pledge of the interest of their employer for their payment." We respectfully submit that mechanics are not more entitled to protection than other laborers who by their toil augment the value of property upon which they work, and it is not presumable that the lawmaking powers have discriminated in their favor from any partiality for them. We suggest that the policy in favor of mechanics in the United States was conceived and adopted to stimulate the construction of towns and cities, and that the system has been extended, commensurately with the growth of the country, to promote its prosperity in the development of its mineral resources. The first mechanic's lien act was passed in 1791, by the general assembly of Maryland, at the solicitation of a commission of which Thomas Jefferson and James Madison were members, and was induced by the desire to encourage the rapid building up of the city of Washington as the permanent seat of government. And it seems logical and fair to believe that similar inducement would have been extended, as far as practicable, to agricultural and other employees, had it been either essential or contributive to the interests of the public and the progress of the country. We present this view as it seems to contain an explanation which is a complete vindication of the legislation in question. The judgment of the lower court is hereby affirmed.

Collier and Laughlin, JJ., concur.

[No. 675. October 2, 1897.]

JAMES S. JARRELL, Appellant, v. R. F. BARNETT,
ASSIGNEE OF W. C. BIRD & CO., Appellee.

EQUITY PRACTICE—FINDINGS OF FACT BY MASTER.—The findings of a special master in chancery on disputed facts referred to him, have the same force and effect as the special verdict of a jury. *Field v. Romero*, 7 N. M. 630; *De Cordova v. Korte*, Id. 678.

Appeal, from a decree for respondent, from the Fifth Judicial District Court, Chavez County. Affirmed.

The facts are stated in the opinion of the court.

JAMES A. POAGE for appellant.

The decree of reference is the limit of the special master's authority, and a finding by him on a matter not referred, and not raised in the pleading, should be ignored as null.

The assignment contains a recital of uncontradicted facts. *Maury v. Lewis*, 10 Yerg. (Tenn.) 115; *Rawson v. Rawson*, 2 Johns. Ch. 495; *Simmons v. Jacobs*, 52 Me. 14; *Levart v. Red Wood*, 9 Port. (Ala.) 79; *White v. Walker*, 5 Flor. 78; 1 Black on Judg., sec. 44, note 101; 2 Id., sec. 641; Id., secs. 530, 532.

The special master had found that \$112.38 of the claim was originally for rent, but it had been paid prior to the decree of reference, and prior to its allowance and approval by appellee. See authorities cited, *supra*.

For scope and duties of master see same cases.

In the judicial character of assignee's acts in allowing claims, and its force as *res adjudicata*, see *Insolvent Laws*, N. M. 1889, pp. 150-161, secs. 19-23, 36; *Rubber Co. v. Good-year*, 9 Wall. (N. Y.) 788; *State v. Ins. Co.*, 5 Pac. Rep. 190; *Eureka Co. v. Bailey Co.*, 11 Wall. (U. S.) 488; *Martin v. Mott*, 12 Wheat. 19; *Steele v. Smelting Co.*, 106 U. S. 47;

14 Am. and Eng. Ency. of Law, head "Master in Equity;" Epright v. Kauffman, 1 S. W. Rep. 736.

LAUGHLIN, J.—The appellant and complainant below, James S. Jarrell, filed his bill of complaint against appellee, respondent below, R. F. Barnett, as assignee of W. C. Bird & Co., and prayed that the sum of \$112.38 be declared a preferred lien by appellee, as assignee of said Bird & Co.'s estate, as a landlord's lien for rent of a building at Roswell, rented by said Jarrell to said Bird & Co. for use as a saloon.

Bird & Co. failed, and made an assignment to said Barnett. Issue was joined by answer and replication, and the

EQUITY practice:
findings of fact
by master.

case was then referred to C. A. Keith, Esq., as special master, and he reported to the court that all the rent had been paid, and that nothing was then due from said Bird & Co. to said Jarrell. The special master was directed by the court to take the proofs in the case on the issues joined, and find, first, "the amount due plaintiff for rent up to the time of the bringing of the suit." The special master found and reported as a fact that Bird & Co. paid complainant, Jarrell, all money due him before the time of the filing of this suit, and the court below confirmed the report, and entered a decree accordingly. The case was referred to the special master by consent of all parties, and his findings on the disputed facts on the evidence produced before him have the same force and effect as the special verdict of a jury. *Field v. Romero*, 7 N. M. 630; *De Cordova v. Korte*, 7 N. M. 678. There is nothing else to be considered in this case. The judgment of the court below is affirmed.

Smith, C. J., and Bantz and Collier, JJ., concur.

[No. 730. October 2, 1897.]

WELLINGTON A. GIVENS, Appellant, v. D. W.
VEEDER, Appellee.

INSURANCE, LIFE—FINDING OF MASTER—EVIDENCE.—The finding of fact by a master in chancery, like the special verdict of a jury, will not be disturbed on appeal, unless the evidence is clearly insufficient to support it.

ID.—ASSIGNMENT, ABSOLUTE OF POLICY, FOR CANCELLATION OF DEBT.—A life insurance policy for a certain sum, assigned absolutely, by the insured to his creditor for the cancellation of a debt, less than half the amount of the policy, was not a "wager policy" or "speculative risk," where, at the time of the death of the insured, the assignee had paid out on the policy, including the amount originally paid thereon, with the semiannual premiums and interest, and other costs and expenses, a sum amounting to nearly the face of the policy.

Appeal, from a decree for plaintiff, from the Second Judicial District Court, Bernalillo County.. Reversed and remanded, with directions; Bantz, J., dissenting.

The facts are stated in the opinion of the court.

VEEDER & VEEDER for appellant.

The court below had no right to review the finding of facts by the master, unless they were manifestly erroneous, or wholly unsupported by the evidence, which is not the case here; and no exceptions thereto were filed upon these grounds. *Girard Ins. Co. v. Cooper*, 362 U. S. 529, 539; *Davis v. Schwartz*, 155 Id. 631; *Kimberly v. Arms*, 129 Id. 524; *Tilghman v. Proctor*, 125 Id. 136; *Callaghan v. Meyers*, 128 Id. 666; *Farrar v. Bernheim*, 74 Fed. Rep. 435, 438; *Clyde v. Richmond & D. R. Co.*, 69 Id. 673, 678; *Medsker v. Bonebrake*, 108 U. S. 66, 72; *Green v. Bishop*, 1 Cliff. 186; *Mason v. Crosby*, 3 Woodb. & M. 269; *Bridges v. Sheldon*, 7 Fed. Rep. 35; *Troy I. & N. Factory v. Corning*, 6 Blatch. 332; *In re Murray*, 13 Med. 550; *McDaniels v. Harbour*, 43 Vt.

462; Howard v. Scott, 50 Id. 48; Howe v. Russell, 36 Me. 115; Richards v. Todd, 127 Mass. 172; Trow v. Berry, 113 Id. 146; De Cordova v. Korte, 7 N. W. 678.

The assignment to defendant was an absolute assignment; and even though defendant did say, as claimed by plaintiff's witnesses, that he held the policy "to secure him," such language is entirely consistent with the idea of an absolute sale. *McLaurie v. Partlow*, 53 Ill. 340, 345. See, also, *Bac. on Ben. Soc.*, sec. 397; *Insurance Co. v. Armstrong*, 117 U. S. 591; *Mut. Life Ins. Co. v. Schafer*, 94 U. S. 457; *Lamont v. Grand Lodge*, 31 Fed. Rep. 177, 181; *Olmstead v. Keys*, 85 N. Y. 593, 609; *Fitzpatrick v. Life, etc., Ins. Co.*, 56 Conn; *Murphy v. Reed*, 1 South. Rep. (Miss.) 761, as to the right of sale and assignment of a life insurance policy, taken out by a person upon his own life.

JOHNSON, FINICAL and A. B. McMILLEN for appellee.

HAMILTON, J.—This suit arose in the Second judicial district court of the county of Bernalillo, wherein the complainant, Givens, as assignee of an insurance policy on the life of one Fiske, filed a bill against the defendant, Veeder, who held a prior assignment of the same policy, to compel the defendant to pay to the complainant a debt due to him, the complainant, from the deceased, Fiske, out of the money collected by the defendant upon the said policy. The issues were joined; the cause referred by consent to a special master, who found the issues of fact and conclusions of law in favor of the defendant, and recommended a dismissal of the bill. The court, on the exceptions to the report of the master, set aside the report, and rendered a decree for the complainant, from which decree this appeal is brought.

The facts, as disclosed by the record and found by the master, are substantially as follows: (1) That on the thirtieth day of August, A. D. 1887, the said Calvin Fiske had an insurance policy upon his life in the Equitable Life Assurance

Society of the United States, for the sum of \$5,000. (2) That on the said date the said Calvin Fiske was justly indebted to the said defendant, Veeder, in the sum of \$2,011, and that the said Calvin Fiske on that day assigned and transferred to the said Veeder the said insurance policy upon his life, in consideration of the cancellation of the said debt, which said assignment was absolute in its terms, and conveyed to the said Veeder all the right, title, and interest of said Fiske in and to said policy. (3) That the said assignment was not conditional, but was absolute, and so regarded by said Fiske and Veeder, and that the said Fiske passed, and intended to pass, the entire title thereto to the said Veeder, who accepted the same in full payment of said claim. (4) That, at the time of said assignment of said policy by said Fiske to said Veeder, the then cash value of said policy amounted to about \$500. (5) That the said Veeder accepted the said assignment of said policy, and the assignment of certain office furniture in said report mentioned, in full and complete satisfaction of said indebtedness so due to Veeder by the said Fiske; and the said Veeder then and there canceled the said indebtedness so due. (6) That the said Veeder, after the assignment and acceptance of said policy, and after the cancellation of said indebtedness, paid all of the semiannual premiums to the company due upon said policy, amounting to the sum of \$162 per year. (7) That the said Veeder never attempted in any way to collect from the said Fiske said debt, nor any of the moneys paid or advanced by him for the annual premiums upon the said policy. (8) That the said Fiske about the thirtieth day of April, 1890, made another and subsequent assignment to the said complainant to secure the said complainant on account of certain indebtedness which was then due the said complainant from the said Fiske, arising upon a security for a certain loan made by said Fiske of and from one Sloan; and it is further found by the master that, at the time of said assignment by said Fiske to said Givens, the said Fiske had no assignable interest in said policy, he having previously thereto sold, assigned, and transferred the same absolutely to said defendant,

Veeder. It is further found by said master that, after the death of said Fiske, the said defendant collected the said amount of the policy, amounting to about \$5,000; that some controversy arose between the said complainant and the defendant at the time the said money was paid by the insurance company; that the defendant then offered to the complainant to pay him \$500, if he would not interfere with the collection of said policy by the defendant, but that the same was not offered as an acknowledgment of any right of the plaintiff to any part of said money, or of any liability of the defendant to him. The said master further finds that the said complainant had no interest whatever in said insurance policy, nor in the proceeds collected therefrom, and that the same belonged to, and of right should be held by, the defendant. And the master found as a conclusion that the said complainant was not entitled in any way to recover, and recommended a dismissal of the bill. These findings of the master were set aside by the court, and a decree rendered on behalf of the said complainant.

Without attempting to review, in this opinion, the testimony admitted, upon which the master made his findings of fact, it is sufficient to say, after an examination of the record, that there is ample testimony upon which to base the findings

FINDING of master:
evidence.

made by the master. It may be true that these findings of fact made by the master were reached by him after the consideration of conflicting testimony. Some of the evidence may have been contradictory. Some of the witnesses testifying on either side may have been interested in the result of the suit, and they may have shown a bias or prejudice. Yet the master saw the witnesses, examined them, and had an opportunity to observe their conduct, and was certainly better capable than the court of properly weighing their evidence, and giving it that due credit to which it was entitled, and of reaching a correct conclusion therefrom. If there was no testimony sufficient to sustain the report, or if the court could discover from an examination of the record that the report was for this reason manifestly wrong, under the evidence, then it would be the

duty of the court to set it aside; but, until this was made to appear, the findings of fact made by the master will be regarded as equivalent to the special verdict of the jury, and can not be disturbed. This view is in harmony with the rule established by the supreme court of the United States in the case of *Davis v. Schwartz*, 155 U. S. 636; *Kimberly v. Armes*, 129 U. S. 512, and followed by this court in the case of *Field v. Romero* (N. M.) 41 Pac. 517, to which rule therein adopted we feel still bound to adhere.

The report of the master has sufficient evidence to support it. Its findings show that the defendant, Veeder, had an absolute assignment of the policy, for a consideration of \$2,011, and that he canceled the debt; that such assignment was regarded and intended by both defendant and assignor as an absolute, unconditional transfer; that the cash value of the policy at the time of the transfer was only \$500; that the policy was kept up by the defendant by his payment of the semi-annual premiums thereon up to the date of the death of said Fiske, amounting to the sum of \$162 per year. The testimony in the record shows (although this fact was not found by the master) that, at the date of the death of Fiske, the defendant, Veeder, had paid out on the policy, including the amount originally paid thereon, with the semiannual premiums and interest, with other costs and expenses, the sum of about \$4,500. Under this state of facts, as found by the master, and presented by the record, we do not think it presents such a case as was passed upon by the court in the case of *Cammack v. Lewis*, 15 Wall. 643. In that case Cammack had only a debt of \$70, and Lewis took out a policy of \$3,000 on his life. Cammack paid the premiums for one year. Lewis then gave Cammack a note of \$3,000, which was without consideration, and took an absolute assignment of the policy, coupled with an agreement back that, in case of the death of Lewis, he (Cammack) would pay to the widow of Lewis one-third of the policy. The court held that, under this state of facts, Cammack could hold only the amount of his debt, with such sums as he had advanced. The real debt due the assignee of the policy in that

case was only \$70, and the great discrepancy between the amount of the debt, \$70, and the face of the policy, \$3,000, was such as to bring the case clearly within the doctrine of a "speculative risk" or a "wager policy." No such state of facts exists in the case before us. Here the debt and the premiums paid, with interest and expenses chargeable against it, covered almost the face of the policy. We are not aware that the supreme court of the United States has laid down any definite rule as to what state of facts must arise, or what discrepancies must exist, between the debt due and the face of the policy to make it a "speculative risk" or a "wager policy." When that court shall have established such a rule, or when it shall have determined that any discrepancy between the amount of the debt and the face of the policy assigned shall constitute it a "speculative risk" or a "wager policy" as to such discrepancy or excess, and that in such a case the creditor can not hold the whole face of the policy, but only the amount of his debt, with interest and costs therein, then we will readily follow such rule; but, until such doctrine is established by that court, each case must rest upon its own state of facts, and the court must be left to establish its own rule as to what facts and conditions will bring a case within the rule of "speculative risk" or "wager policy." In view of the close equality, as shown by the record, which existed between the amount due the defendant and the face of the policy at the date of the death of Fiske, we can not say that it is in any sense a "wager" or "speculative policy."

Even upon the other theory, however, that the defendant, Veeder, could only hold out the full amount of his debt, the premiums, interest and costs therein, the decree entered in the case could not be sustained. The court, in its decree, found that there was due to the complainant the sum of \$918.50, with costs of suit, and rendered a decree against the defendant for this sum, regardless of the amount due the defendant for money expended by him on account of said policy, the annual premiums paid, and interest and costs therein. The record in the case shows, from the testimony of the only witness offered

ABSOLUTE assign-
ment of policy
for cancellation
of debt.

upon that question, whose testimony is uncontradicted, that, at the date the money was paid by the insurance company upon the policy, there was then due the defendant, on account of the original debt canceled on account of said policy, and the annual premiums paid, with interest and costs thereon, the sum of over \$4,500, nearly the face value of the policy; and, had he included the costs and expenses of collecting the policy, it would, as he said, have covered quite the entire face of the policy. Now, even upon the theory contended for by the complainant (the appellee herein), the defendant, Veeder, was entitled to be paid all of this advance before any amount could be adjudged to be due the complainant; and it was error in the court to render a decree in favor of the complainant for \$918.50 without first ascertaining and determining from the testimony the full amount paid out and expended by the defendant upon the policy, with interest and costs therein, and deducting this from the amount received from the defendant upon the policy. We feel, therefore, that, from any view of the case, the decree can not be sustained. Our opinion is, however, that the reversal of the case may be put upon the first ground; that, under the record and evidence in the case, this was not a "wager policy" or "speculative risk," which is so frequently denounced by the courts. The cause is therefore reversed and remanded, with directions to the court below to dismiss the bill.

Smith, C. J., and Laughlin, J., concur; Bantz, J., dissents.

[No. 716. October 2, 1897.]

HENRY LOCKHART, Plaintiff in Error, v. J. Q. WILLS
et al., Defendants in Error.

MINES AND MINING—EJECTMENT—PLEA, ABANDONMENT OF CLAIM—JURY QUESTION.—In ejectment for the possession of a mining claim, where the question of the abandonment of possession of the claim by plaintiff was in issue, it was a question of fact for the jury.

ID.—EJECTMENT—ISSUES—EVIDENCE—COMPETENCY.—Where the issues of fact were distinctly and clearly presented on the trial, any evidence tending to establish any of such issues was admissible, and should have gone to the jury.

Error, from a judgment for defendants, to the Second Judicial District Court, Bernalillo County. Reversed and remanded.

The facts are stated in the opinion of the court.

WARREN, FERGUSON & GILLET for plaintiffs in error.

The declarations offered were admissible. 1 Greenlf. Ev., secs. 147, 148; 2 Best on Ev., sec. 500; Steph. Ev. 40, art. 28; Underhill Ev., sec. 118; 5 Am. and Eng. Ency. Law, 366; Lincoln v. Claffin, 7 Wall. 132; Daggett v. Wallace, 13 S. W. Rep. 49; 4 Am. and Eng. Ency. Law, 583.

The alleged abandonment of the property by plaintiff was a pure question of intention in fact for the jury, to be determined upon the facts and circumstances in evidence. Marshall v. Barney, 47 N. W. Rep. 290; Moore v. Rollins, 36 Cal. 338; Taylor v. Middleton, Do. 656; Meyers v. Spooner, 55 Id. 357; Judson v. Malvy, Id. 309; Quigley v. Gillett, 35 Pac. Rep. 1040; Hammer v. Garfield, 130 U. S. 292; Oscamp v. Crystal, etc., 58 Fed. Rep. 298; St. John v. Kidd, 26 Cal. 268; Davis v. Perley, 30 Id. 336; 1 Am. and Eng. Ency. Law, 1; Comp. Laws 1884, secs. 1570, 2218, 2258, 2263; Deemer v. Falkenberg, 4 N. M. 149; New Mexico, etc., v. Crouch, Id.

293; *Anderson v. Gray*, 25 N. E. Rep. 843; *Christy v. Scott*, 14 How. 282; *Coryell v. Cain*, 16 Cal. 567; *Wilson v. Fine*, 38 Fed. Rep. 792; *Gonder v. Miller*, 27 Pac. Rep. 333. See, also, as to withdrawal from jury determination of disputed facts in issue where there is a substantial conflict of testimony: *Chaves v. Chaves*, 3 N. W. Rep. 306; *Kirschner v. Laughlin*, 4 Id. 389; *Manchester v. Ericsson*, 105 U. S. 347; *Conn. Mut. Co. v. Lathrop*, 111 Id. 612; *Insurance Co. v. Rodel*, 95 Id. 338; *Montclair v. Dana*, 107 Id. 162; *Jackson v. Jackson-porte*, 56 Wis. 310.

CHILDERS & DOBSON for defendants in error.

As to declarations of partners after dissolution of partnership, see: Pars. on Part. 38, 39, 384; Story on Part., sec. 323; *Hackley v. Patrick*, 3 Johns. 536.

Failure to do the work required by the laws of the United States and of New Mexico, and the district rules, in itself works an abandonment. *Ferris v. Coover*, 10 Cal. 631; *St. John v. Kidd*, 26 Id. 272; *Davis v. Butler*, 6 Id.; *Derry v. Rosse*, 5 Id.; *Mallett v. U. S. Co.*, Id. 29; *Depuy v. Williams*, 5 Mar. 251; *Strange v. Ryan*, 1 Id. 48.

When a party fails to perfect his location abandonment takes place under common law principles independent of any mining rule, and the ground becomes public domain, open to the next occupant. *St. John v. Kidd*, and other cases cited, *supra*.

"A court may withdraw a case from the jury, and direct a verdict where the evidence is undisputed, or so conclusive that the court would set aside a verdict in opposition to it." *Railroad Co. v. Converse*, 139 U. S. 469; *Goodlett v. Railroad Co.*, 122 Id. 391; *Gunther v. Ins. Co.*, 134 Id. 110; *Elliott v. R'y Co.*, 150 Id. 245.

HAMILTON, J.—This is a suit in ejectment, brought here from the district court of Bernalillo county, in the Second judicial district. At the conclusion of the evidence, the court, at the instance of the defendants, directed a verdict in

their favor. From this action of the court in giving such instruction, and taking the case from the jury, this writ of error is prosecuted.

The errors assigned are: (1) The action of the court in refusing to submit the cause to the jury under the evidence admitted. (2) The improper exclusion of certain evidence offered by the plaintiff, and the admission of certain evidence on behalf of the defendants.

The first question, therefore, is, did the court commit error in refusing to submit the cause to the jury under all the evidence which it had allowed to be offered in the case? The court has the right, and it is its duty, to withdraw a case from the jury, and direct a verdict if the evidence in the case is undisputed, or if the evidence is so conclusive that the court would set aside a verdict if rendered in opposition to it. *Richardson v. City of Boston*, 19 How. 263; *Railroad Co. v. Converse*, 139 U. S. 460; *Elliott v. Railway Co.*, 150 U. S. 245. Does the case before us come within either of the rules above stated?

The testimony offered in the case, and submitted by the court to the jury, tended to establish that the plaintiff, one Charles Pilkey, and one Benjamin Johnson entered into a written agreement, signed and executed by each of them, on the seventh day of May, A. D. 1893, whereby it was agreed that the said first party, Charles Pilkey, should prospect for and locate such veins, lodes and placers as he might discover or know the existence of, containing valuable ores and minerals, in the name of, and for the joint benefit of, all the parties hereto, in the proportion of a one-third interest to said first party, Charles Pilkey, and an undivided two-thirds interest to said second parties, being the plaintiff and the said Johnson. It was further provided in said agreement that the said second parties, to wit, the plaintiff and said Benjamin Johnson, should furnish certain supplies and material to the said Pilkey while he was engaged in prospecting, locating and working said mines, which was fully set forth in the agreement. The

MINES and mining:
ejectment: plea:
abandonment:
jury question.

execution of this agreement is admitted by both the plaintiff and the defendants. It is further established by the testimony that, under this agreement, the said Pilkey, after having received his supplies from the plaintiff and the said Johnson, went into the Cochiti mining district, and located certain mines therein, among which is the claim in controversy in this suit, known as the Sampson location. It is established by the testimony, both by the plaintiff and the defendants, that this location of the Sampson mine was made on the tenth day of July, 1893, by posting a notice in a conspicuous place upon said claim, containing a description of the grounds located, and signed by the plaintiff, Benjamin Johnson, and Charles Pilkey. The evidence also tended to show that the plaintiff in this cause and the said Benjamin Johnson complied with their part of the said agreement, by furnishing the supplies and material to the said Pilkey while he was engaged in such work of prospecting for and locating said property.

The testimony of the plaintiff tended to establish that he visited the said property after it was located, and did some prospecting thereon; that it was arranged between him and Pilkey that the assessment work should be done before the expiration of the ninety days from the date of the posting of said notice; that he had various assays made from samples taken from the ledge; that he had some correspondence with Pilkey, and gave directions and instructions to Pilkey, from time to time, to have the assessment done; that Pilkey was on or near the ground, doing the assessment upon other property which he had located under the said agreement on behalf of the plaintiff, Johnson, and himself, and it was understood that Pilkey should complete this assessment within the time provided by law. His testimony further tended to establish that he, with Pilkey, or through Pilkey, had continued in possession of this ground up to the time that it was taken possession of by the defendants, and located by them; that he never had any intention whatever of giving up or abandoning the ground, but always intended to hold and work it. The testimony of another witness in the case tended to show that Pilkey was in possession

of the ground in conjunction with and for the plaintiff, Lockhart, and Johnson and himself. The contention of the defendants is that no work had been done upon this mine after its location and after the posting of the notice, so as to hold it under the laws of the United States; and their contention is that the plaintiff had wholly abandoned the claim prior to the time the defendants took possession, and located the ground under the name of the Washington Mine.

The testimony on behalf of the defendants tended to show that, after the mine was located and the notice posted, no assessment work was done upon the property; that no ten-foot hole was sunk; that the claim was not monumented in the manner required by law; and that, in fact, no work was done thereon by either Pilkey or the plaintiff, Lockhart. The testimony further tended to establish that about the third or fifth of October, 1893, five or seven days before the expiration of the ninety days within which they were required to do the work and record the notice, under the laws of the United States, Pilkey notified the plaintiff and Johnson that he would have nothing further to do with the property, and would abandon the contract which had been entered into, so far as he was concerned. Under the testimony which was offered to the jury, and admitted by the court, both on behalf of the plaintiff and the defendants in the case, the question of the abandonment of the possession of the mine by the plaintiff was directly in issue. The testimony offered, and the rulings of the court upon the testimony which was both admitted and rejected, show that this was the real issue to be submitted to the jury.

The question as to whether the testimony introduced and admitted by the court established the fact that the claim was discovered and taken possession of by the plaintiff and his co-tenants, Pilkey and Johnson, and as to whether the plaintiff continued in such possession until he was ousted therefrom by the defendants, or as to whether the plaintiff abandoned such possession, are questions of fact, which should have been determined by the jury under proper instructions from the court. Where the testimony tends to the establishment of facts from

which the inference of abandonment or want of abandonment may be drawn, then the jury, and not the court, must determine the facts, and draw the inference from the testimony offered. Abandonment is a question of act, as well as intent, and it is also said that it is a question of mixed law and fact. See *Oreamuno v. Mining Co.*, 1 Nev. 215; *Weill v. Mining Co.*, 11 Nev. 200. A party's own testimony that he had not intended to abandon is not conclusive upon the jury. The intention to abandon must be determined by the jury from all the facts and circumstances in the case. *Myers v. Spooner*, 55 Cal. 257. Even though it might be shown that Pilkey had repudiated the contract, and had, so far as he was concerned, abandoned and given up the mine, and so notified his tenants in common, Johnson and the plaintiff, yet the existence of this fact alone would not necessarily be construed into an abandonment of the property by the plaintiff. The plaintiff having denied his abandonment and insisted upon his possession, the question should have been submitted to the jury. My opinion, therefore, is that it was error for the court, in the face of the evidence admitted, to direct a verdict, and refuse to submit the cause to a jury.

The next error assigned is the improper exclusion of certain evidence offered by the plaintiff. It was contended by the plaintiff on the trial that, after the location of the mine, and while the same was in possession of the plaintiff, and before the time had expired within which he might do the work, and file and record the notice, and perfect his location, as required by the United States statutes, Pilkey, the other tenant in common with the plaintiff, entered into a fraudulent conspiracy with one Fagaly and one Walker, and other defendants, to obtain possession of the mine, and that, as a result of this fraudulent collusion, Pilkey and the other defendants ousted the plaintiff from the possession of the mine, and fraudulently took and held, and still hold, possession thereof from the plaintiff in support of this contention, the plaintiff, on the trial, made and tendered the following offer of proof, as

EJECTMENT:
issues:
evidence:
competency.

found on pages 418 and 419 of the record: "In connection with the witness John S. Neeland, now on the stand, we re-offer his testimony as taken before the court upon the case in chief of the plaintiff, and then rule out that evidence as taken by the stenographer, which is offered in rebuttal; and we also offer the testimony of Mrs. Stella A. Metz, George Blake, B. J. Lohman, and Mrs. Ellen Lockhart, offering to prove by said witnesses statements made at different times and places to the said witnesses by Frank Fagaly and Levi Walker, who are now dead, as well as statements of Charles Pilkey, who is now a defendant in this case, which statements of the said three parties, two of whom are now dead, were made prior to October 10, 1893, and the said statements were and are to the following effect: That in September, 1893, ore was sent from the Sampson mine by Pilkey, who was then in charge of the Sampson mine for Henry Lockhart and Ben Johnson, to Levi Walker, which the said Walker had assayed; that thereupon, soon afterwards, the said Pilkey being in Albuquerque, and about the middle of September, the said Walker and Pilkey agreed to take Frank Fagaly into the scheme to obtain possession of the said Sampson mine, and oust the said Henry Lockhart and Ben Johnson therefrom; that it was then arranged by the three parties named, in the presence of some one or more of the above named witnesses, that the said Fagaly should accompany the said Pilkey to the Sampson mine for the first time in the month of September, 1893, and did go into possession with the said Pilkey of the said mine, in pursuance of the arrangement and conspiracy aforesaid, did exercise acts of ownership and possession, and take samples of ore from the said vein, with which he returned to Albuquerque; that thereupon assays were had of the said ore, so brought by Fagaly to Walker, and that soon after the return of said assay, which was about \$2,600 to the ton, the said Pilkey came to Albuquerque October 2 or 3, 1893, and that it was then arranged that, in view of the large assay, it was necessary to speedily get back upon the Sampson claim, inasmuch as ninety days would elapse from its location on October 10th, and that on or about the

sixth or seventh of October the said Fagaly and the said Pilkey actually left Albuquerque with the express intention of taking actual possession of the said Sampson mine and did so actually, prior to October 10, 1893, resume the possession which had been begun when Fagaly first visited said mine in September, and from that taking of actual foot possession prior to October 10, 1893, they actually so held possession, and have continuously held it since," which offer was denied by the court, and the evidence rejected. The contention of the defendants was that there was no wrongful ouster of the plaintiff, but that at the time the defendants entered into possession of the mine, and located the same, and for a long time prior thereto, the mine had been wholly abandoned by the plaintiff and his associates, and therefore the possession and location by the defendants was rightful. The issue of fact, therefore, between the plaintiff and the defendants, as to the possession of the plaintiff, his wrongful ouster therefrom by the defendants, his abandonment of the mine, and their rightful possession and location thereof, were thus clearly and distinctly presented. Therefore, any competent testimony which would tend to establish any of these issues was clearly proper and should have gone to the jury. If the plaintiff was rightfully in possession of the mine, and seeking to hold it, and the time had not expired within which he was allowed to do the work and perfect his location, and if during this time the defendant wrongfully intruded upon his possession, and ousted him from the mine, then the plaintiff could not be charged with abandonment. Abandonment can not be charged against the locator of a claim if, while he is in possession, his claim has been seized by another, who holds the possession of it adversely to him. See *Manufacturing Co. v. Dickert*, 21 Pac. (Utah) 1002.

We can not state, from the condition of this record, and the nature of the objections made by the plaintiff in error to the evidence, just what portion of the testimony should have been excluded and what really admitted. The offer was probably much broader than would have been legally admissible. While the evidence as to the statements made by Fagaly and

Walker would not, probably, have been competent, yet their acts and conduct, which might tend to show that they, with Pilkey and the other defendants, wrongfully entered upon the possession of the plaintiff, and ousted him from the mine before the time had expired within which he could do the work, that is before the tenth of October, 1893, would be competent and admissible.

As to the evidence offered of the statement of Pilkey, he having located the mine in the name of himself, the plaintiff, and Johnson under the contract, and they all having been in possession of the same, his statements in relation to the possession of the mine by the plaintiff, or the abandonment thereof, and the formation and consummation of any plan by him and the defendants to take possession of the mine for the defendants, and oust the plaintiff therefrom, would be competent. Also the statements made by him, if any, contradictory of his evidence given, would be competent, if the foundation was laid for it.

The cause must be reversed and remanded for a new trial, and it is so ordered.

Smith, C. J., and Laughlin and Bantz, JJ., concur.

[No. 729. October 2, 1897.]

UNITED STATES OF AMERICA, Plaintiff in Error and Appellant, v. FRANK LESNET et al., Defendants; ANNIE LESNET, Intervener, Defendant in Error and Appellee.

HOMESTEAD EXEMPTION—SUIT ON OFFICIAL BOND—INTERVENING PETITION—LAWS 1891, P. 123, SEC. 5—APPEAL.—Under section 5, Laws 1891, page 123, an appeal does not lie from a suit at law upon an official bond, and the mere filing of an intervening petition in such action did not convert it into an equitable action; it was only a supplementary proceeding in the original suit. *Bank v. Brooks*, 9 N. M. p. 113, ante.

Id.—SERVICE OF NOTICE—INTERVENING PETITION—SUFFICIENCY.—In such action, where the United States marshal was served with a notice of a claim of homestead, but refused to set apart the property, and sold the same under execution, an intervening petition alleging these facts, and that intervener was the wife of defendant, that he had abandoned his family, that the property was the homestead and place of residence of the family, and that she served the marshal with such notice before the sale, the petition was properly sustained.

Id.—EXEMPTION CLAIM—SUFFICIENCY AS AGAINST UNITED STATES—ACT CONGRESS, JULY 14, 1870, 16 U. S. STATUTES.—Under an act of congress of July 14, 1870, one entitled to an exemption of homestead under the laws of New Mexico, may hold the same against the United States.

Id.—PRACTICE, APPELLATE—AFFIDAVITS NOT PART OF RECORD PROPER—PRESUMPTION.—Affidavits which are no part of the record proper, will not be reviewed on appeal; and in the absence of any testimony, this court will not presume that there was sufficient testimony to sustain the finding of the court below.

Appeal, from and error to the Fifth Judicial District Court, from a judgment for intervener on her intervening petition. Affirmed.

The facts are stated in the opinion of the court.

W. B. CHILDERS, United States attorney, for United States.

In setting aside the homestead in this case the court acted without authority of law. *Fink v. O'Neill*, 106 U. S. 196. See, also, *New Orleans v. Winter*, 1 Wheat. 91, 95; *Hepburn v. Ellzey*, 2 Cranch, 445, 453.

The court erred in reopening the judgment to allow petitioner to make claim for homestead. *Laws* 1887, p. 175, sec. 16; *Wildermuth v. Koenig*, 41 Ohio St. 145.

Occupancy at the time of the levy and sale, and certainly, at least, at the time of the filing of the petition, was a necessary averment in the petition. *Wap. Hom. and Exempt.*, p. 699.

Intervener not having made claim for a homestead before final sale, her right to claim the exemption in that proceeding

was lost. *Norris v. Kidd*, 28 Ark. 485; *Chambers v. Perry*, 47 Id. 400; *Wap. Hom. and Exempt.*, 743-746, 866.

E. V. CHAVEZ for Annie Lesnet.

In case of execution upon judgments in civil actions, the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied on is found. *Rev. St. U. S.*, sec. 916; *Fink v. O'Neill*, 106 U. S.; and this act applies as well to courts and citizens of a territory as to those of a state. *Organic act*, sec. 1891; *Steamship v. Phelps*, 101 U. S. (11 Otto, 453).

Before the defendant marshal attempted to sell the property in question, defendant in error, applied to the officer making the sale to set the same apart as a homestead. *Laws 1887*, sec. 16, p. 76. See, also, *Thomp. Hom. and Exempt.*, secs. 821, 853.

Selling exempt property will justify setting aside sale. 12 *Am. and Eng. Ency. Law*, 235; 22 Id. 676, and notes.

LAUGHLIN, J.—The above case was brought up from the Fifth judicial district court of New Mexico, upon an appeal and writ of error sued out from this court by the plaintiffs in error and appellants, the United States of America, to reverse a judgment and decree of that court rendered February 6, 1897, in setting aside a homestead upon the application of Annie Lesnet, wife of Frank Lesnet, defendant in the suit against him in said court. Suit on bond of Frank Lesnet, as receiver of public moneys at the land office of the United States, at Roswell, Chaves county, New Mexico, was begun against the said Lesnet and his bondsmen in an action of debt on bond because of a shortage in the accounts of said Lesnet as such receiver. Lesnet having left the territory, the plaintiff in said suit, the United States, sued out a writ of attachment of his property, under which a levy was made on certain lands of the defendant, Lesnet, among which was lot number 8 in block 28 in the town of Roswell, Chaves county, New Mexico. Judgment was had on said attachment in favor of

plaintiffs, and writ of venditioni exponas issued for the sale of all the lands attached, and sale was made on February 27, 1896; but on February 27, 1896, before such sale was made, said Annie Lesnet made application in writing to the officer making said sale to set aside to the family of Frank Lesnet lot 8 in block 28 in the town of Roswell, New Mexico, with the improvements thereon, as a homestead, which was not done. On June 17, 1896, Annie Lesnet, wife of said Frank Lesnet, who had been living at Lincoln, Lincoln county, New Mexico, since the summer of 1893, filed, in the suit in which judgment had been obtained for plaintiffs against her husband, a petition asking for an assignment of said lot 8 in block 28, as the homestead of the said Frank Lesnet. The court entertained the petition, and assigned to the said Annie Lesnet the said lot 8 in block 28 in the town of Roswell (which had been, in the prior month of March, 1896, deeded to the United States, as purchasers at said sale) as the homestead of the said Frank Lesnet. From this judgment the United States appealed, and also sued out a writ of error to the said court, from this court.

The only matters for consideration here are (1) the right of the appeal sued out by the United States as appellants; (2) the writ of error sued out by the United States as plaintiffs in error; and (3) the jurisdiction of the court below to set aside the sale made by the United States marshal, and award to the defendant in error Annie Lesnet, as intervener, a homestead.

1. The original case of the United States against Frank Lesnet and others was a suit at law upon the official bond of defendant Lesnet, and the mere filing of an intervening petition to have the homestead set aside did not change the proceeding from an action at law into an equitable action. It was only a supplementary proceeding in the original suit. *Bank v. Brooks* (decided at this term), 49 Pac. 947; *Freem. Ex'ns*, 392 et seq. Appeals in equity cases and writs of error in common law cases are especially provided for by statute. Laws 1891, p. 123, sec. 5; *Railroad Co. v. Martin*, 7 N. M. 158. The judgment is not the termination of the

Suit on official
bond: interven-
ing petition.
Laws 1891, p. 123,
sec. 5: appeal.

suit. It may appropriately be termed the trunk of the suit, while the execution is the fruit and end of it, and the proceedings upon the execution are but branches of the trunk or main suit, and are proceedings in the suit. *Bank v. Halstead*, 10 Wheat. 51. The motion of appellees to dismiss the appeal is well taken, and the appeal is dismissed.

2. The case is here properly on writ of error, and the motion of defendants in error to dismiss on that ground is denied. But the writ of error brings up for consideration only the record proper, because there is no motion for a new trial, and no bill of exceptions. The first assignment of error is that the court below erred in sustaining the petition of Annie Lesnet, and making an order setting apart to her a homestead out of the property which had been already sold under venditioni exponas, and purchased by the

NOTICE of exemp-
tion: intervening
petition: suffi-
ciency.

plaintiffs in error. The property in question claimed as a homestead is lot number 8 in block number 28, town of Roswell, Chaves county, New Mexico, and it was sold by the United States marshal for this territory through his deputy, O. L. Ballard, on the twenty-seventh day of February, 1896, and was bought in for the plaintiffs in error; but on the same day, and before the property was offered for sale, Annie Lesnet, this intervenor, as the wife of said Frank Lesnet, caused to be served upon said Deputy Ballard a notice in writing, addressed to him as the deputy of the marshal, which is as follows: "You are hereby notified that lot 8, block 28, together with the residence and all other improvements thereon, are claimed as homestead for the family of Frank Lesnet, late receiver of public moneys in the public land office, at Roswell, New Mexico; and you are requested not to sell the same, but to have it set aside from the sale of property this day to be made in the interest of the United States as said family homestead, he being entitled to the same as the head of a family." The statute under which this claim of homestead is made is as follows, to wit: Section 13: "Husband and wife, widow or widower, living with an unmarried daughter or unmarried

minor son, may hold exempt from sale or judgment or order, a family homestead, not exceeding one thousand dollars in value, and the husband, or in case of his failure or refusal the wife, shall have the right to make the demand therefor; but neither can make such demand if the other has a homestead. * * * ”

Section 16: “The officer executing any writ of attachment or execution founded on any judgment, or order or decree, shall on application of the debtor, his wife, agent or attorney, at any time before sale, if such debtor has a family, and if the lands or tenements about to be levied upon or any part or parcel thereof, constitute the homestead thereof, cause the inquest of appraisers upon their oath to set off to such debtor, by metes and bounds, a homestead not exceeding one thousand dollars in valuation. * * * ” Laws 1887, pp. 75, 76. The officer executing the writ of venditioni exponas having refused to entertain the notice of claim of homestead served upon him, and to set apart the property as a family homestead to the family of said Frank Lesnet, the said Annie Lesnet filed her intervening petition on the seventeenth day of June, 1896, and alleged, among other things, that she was the wife of said Frank Lesnet, and that he had abandoned his family during the month of February, 1893, and had never since returned; that the property here in question was a homestead and place of residence of their family; that, before the sale of the property in question, she served notice upon the officer who made the sale that the property was claimed as a family homestead of the family of said Frank Lesnet. We think this petition was seasonably made, and that the court properly entertained it. The statute (section 16, supra) provides that “such assignment of the homestead shall be returned by the officer along with the writ, and at the next succeeding term of the district court, the officer holding such writ shall return said assignment of homestead to the clerk thereof, the same to be entered on the records of said court, and if no complaint be made by either party, no further proceeding shall be had against the homestead, but the remainder of the debtor’s lands and tenements, if any there be, liable

to sale on execution. Upon complaint of either party, and upon good cause shown, the court out of which the writ issued may order a re-appraisement and assignment of the homestead. * * * ” The statute prescribes a specific procedure to be followed by the officers executing the writ, and in the case at bar he did not pursue it. If he was of the opinion that the property in question exceeded in value \$1,000, it is plain that his duty was to have it appraised in the manner provided by law. This he did not do, but disregarded the claim and request of the homestead claimant, and, wholly in disregard of the statute, sold it. The court below, after a hearing upon the intervening petition, sustained the prayer of the petitioner, set apart to her said lot number 8 in block 28, town of Roswell, and held that the sale made by the marshal of said lot was without authority of law, and null and void, and that judgment is here sustained and affirmed. We are of the opinion that the provisions of the statute supra are so plain that neither argument nor authority is necessary to support this position.

The only remaining assignment of error is that the court erred in holding that the petitioner was entitled to a homestead allowance as against the government, Plaintiffs in error contend that a citizen of this territory can not claim and hold a homestead under the exemption laws of the territory as against the United States, unless by authority of some act of congress expressly authorizing such exemption.

EXEMPTION: sufficiency as against U. S.

It is needless to discuss this question further than to say that congress has legislated directly upon this subject, in language as follows: “That the following recited portion of a statute of the territory of New Mexico, approved February second, eighteen hundred and sixty-five, viz.: ‘And no writ of execution shall on any account be executed on the real estate of any person, if there be no mortgage made by the husband and wife owning the said property, and the mortgage must have been executed with all the formalities required by law,’ be, and the same is hereby disapproved and declared null and void;

provided, that there shall be exempt from levy and forced sale under any process or order from any court of law or equity in said territory the lot or parcel of ground and the buildings thereon occupied as a residence and owned by the debtor, being a householder and having a family, to the value of one thousand dollars. And if, in the opinion of the creditors, the premises claimed by such debtor as exempt are worth more than one thousand dollars, then it shall be lawful for the officer to advertise and sell the said premises and out of the proceeds of such sale to pay to such execution debtor the said sum of one thousand dollars, which shall be exempt from execution for one year thereafter, and apply the balance on said execution; and provided, further, that no sale shall be made unless a greater sum than one thousand dollars shall be bid for said premises." Approved July 14, 1870 (16 Stat. 278). This act of congress is still in full force and effect here, and it expressly says "that there shall be exempt from levy and forced sale under any process or order from any court of law or equity in said territory the lot or parcel of ground and buildings thereon occupied as a residence." Any process or order from any court of law or equity in said territory must necessarily include a process issued upon a judgment obtained in a suit arising under the constitution and laws of the United States, as well as a process issued upon a judgment obtained in a suit arising under the laws of the territory. It was clearly the intention of congress to exempt to a householder having a family, a homestead, not to exceed in value \$1,000. That congress had plenary power to enact this law, and to legislate directly for the territory, is a question which has long since passed beyond the line of controversy. We think this law overcomes the contention urged by the plaintiffs in error, that one entitled to the exemption of a homestead under the laws of the territory can not hold it as against the United States.

3. But, aside from this act, congress, by section 1851, Revised Statute United States, has specially provided that "the legislative power of every territory shall extend to all

rightful subjects of legislation not inconsistent with the constitution and laws of the United States." Certainly, our territorial statutes on homestead exemptions, as they now exist, are rightful subjects of legislation, and they are not inconsistent with the constitution and laws of the United States, because as early as May 20, 1862, when congress enacted the original homestead law, it specially provided, by section 4, (Rev. St. U. S., sec. 2296), that "no lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." That act of congress has been justly regarded by the American people with jealous pride, and well it may be, because it would perhaps be difficult to find another single law of congress which has been attended with more beneficial results to the people than this one. It has encouraged people to settle upon the public lands, till the soil, and build up prosperous and happy homes; and at the same time it has provided a protection to those who chose to do so, and who chanced to be insolvent at the time, against their rapacious creditors. It encourages good citizenship, and thereby benefits both the state and the nation. *Seymour v. Sanders*, 3 Dill. 437. In commenting on section 5296, Revised Statutes United States, under the title "Remission of Fines, Penalties and Forfeitures," the court said, in *Fink v. O'Neill*, 106 U. S. 272 (1 Sup. Ct. 325): "Nothing can be more clear than this, as a recognition of congress that, in case of execution upon judgments in civil actions, the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied upon is found, and that, by this provision in favor of poor convicts, it was intended, even in cases of sentence for fines for criminal offenses against the laws of the United States, that the execution against property for its collection should be subject to the same exemption as in civil causes." As we have before said, our territorial statutes allowing the exemption of a homestead are not inconsistent with the constitution and laws of the United States, but, to the contrary, are in harmony with the settled national

policy of the general government for the past forty years, and we see no reason why they should not apply and be recognized by the United States in this territory, because so long as the statutes apply to rightful subjects of legislation, and are not inconsistent with the constitution and laws of the United States, they stand as the law of the land, until annulled or modified by an affirmative act of congress. It has been held by the highest courts of England (*Dixon v. Arms Co.*, 1 App. Case. 632) that the sovereign is entitled to the use of a patented invention without compensation to the patentee, because the patented privilege is granted against the subjects only, and not against the crown. Mr. Justice Bradley, in commenting on this subject, in *James v. Campbell*, 104 U. S. 356, speaking for the court, said: "The United States has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters patent to those who entitled themselves to such grants. The government of the United States, as well as the citizen, is subject to the constitution; and, when it grants a patent, the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor." In referring to the homestead exemption laws, in *Fink v. O'Neill*, *supra*, Mr. Justice Matthews, in delivering the opinion of the court, said: "In the *Magdalen College Case*, 11 Coke, 66b, Lord Coke, referring to Lord Berkley's Case, Plowd. 246, declared that it was then held that the king was bound by the statute *de donis* (13 Edw. 1), because, for other reasons, 'it was an act of preservation of the possession of noblemen, gentlemen, and others,' and 'the said act,' he continues, 'shall not bind the king only, where he took an estate in his natural capacity, as to him and the heirs male of his body, but also when he claims an inheritance as king by his prerogative.' By parity of reasoning, based on the declared public policy of states, where the people are sovereign, laws which are acts of preservation of the home of the family exclude the supposition of any adverse

public interest, because none can be thought hostile to that; and the case is brought within the humane exception that identifies the public good with the private right, and declares that general statutes which provide necessary and profitable remedy for the maintenance of religion, the advancement of good learning, and for the relief of the poor, shall be extended generally according to their words, for civilization has no promise that is not nourished in the bosom of the secure and well-ordered household."

4. It is urged in behalf of the plaintiffs in error that the intervener, Annie Lesnet, had abandoned the property claimed as a homestead, as shown by the affidavits filed by her with her petition, and that, therefore, she is not entitled to hold it under her claim as a homestead. The difficulty with this position is that the affidavits were offered and considered in the court below as evidence, and the court entertained them as such, and made its finding upon them, as testimony in the case; but this court can not consider them here, because they are no part of the record proper, and are not here for review by any motion for a new trial or bill of exceptions. And, in the absence of testimony, it will be presumed by this court that there was sufficient testimony before the lower court to sustain its findings of fact. There appearing no reversible error in the record proper, the judgment of the court below is affirmed.

PRACTICE, appellate: affidavits not part of record proper: presumption.

Smith, C. J., and Collier and Bantz, JJ., concur.

[No. 737. October 2, 1897.]

TERRITORY OF NEW MEXICO, Appellee, v.
CHAVEZ Y. CHAVEZ, Appellant.

CRIMINAL LAW—PRACTICE, APPELLATE —ERROBS ASSIGNED, NOT APPARENT ON RECORD.—Where there is no motion for new trial in the bill of exceptions, errors assigned, relating to things done on the trial, are not reviewable on appeal. *Padilla v. Territory*, 8 N. M. 562.

Appeal, from a judgment of the Fourth Judicial District Court, San Miguel County, convicting defendant of murder in the first degree. Affirmed.

VEEDER & VEEDER for appellant.

ALBERT B. FALL, solicitor general, and W. H. POPE, assistant, for the territory.

Errors complained of and not presented to the court below, by motion for new trial, will not be considered by the appellate court. *Padilla v. Territory*, 8 N. M. 562, and cases cited.

BANTZ, J.—This cause was before this court on former appeal at last term, and was then reversed and remanded. 45 Pac. 1107. Upon a new trial the defendant was again convicted of murder in the first degree, and sentenced to death, and the cause is again brought here on appeal.

Fifty-six errors are assigned by defendant relating to things done during the progress of the trial. We can not, however, pass upon these alleged errors, as there is no motion for a new trial in the bill of exceptions. It is a fundamental rule that such errors must be brought to the attention of the court below by a motion for a new trial, an exception must be saved to the overruling of that motion, and the motion must be made

matter of record by a bill of exceptions. *Padilla v. Territory*, 45 Pac. (N. M.) 1120. There is no error in the record proper. For these reasons the judgment must be affirmed.

Collier, Hamilton and Laughlin, JJ., concur.

[No. 711. October 2, 1897.]

NEILL B. FIELD, Plaintiff in Error, v. JOHN S. CAIN,
Defendant in Error.

JUDGMENT, FOREIGN—ASSIGNMENT OF—EVIDENCE.—In a suit on a judgment obtained in the court of another state, alleged to have been assigned to plaintiff, the validity of which depends on the statutes of that state, which are not proved, nor the genuineness of the judgment creditors' signature shown, a recovery can not be had. The courts of this territory can not take judicial notice of the statutes of another state; they must be proved as facts in the case. Nor is the record sufficient evidence of the assignment.

Error, from a judgment for plaintiff, to the First Judicial District Court, Santa Fe County. Reversed and remanded. The facts are stated in the opinion of the court.

F. W. CLANCY for plaintiff in error.

The authentication of the alleged transcript was insufficient, because plaintiff below has attempted to certify his own record. *Filkins v. O'Sullivan*, 79 Ill. 524; *Morton v. Crane*, 39 Mich. 528; *Singletary v. Carter*, 1 Bail. (S. C.) 467.

The alleged record fails to show that the Louisville law and equity court is the successor of or the same court as the vice-chancellor's court. *Morris v. Patchin*, 24 N. Y. 396, 397; *Haynes v. Cowen*, 15 Kan. 643; *Ducommun v. Hysinger*, 14 Ill. 249.

There is no legal evidence to show any assignment of the original judgment to Cain. He can not by his own act make

the alleged assignment a part of the record. *Brown v. Wright*, 21 L. R. A. 467; 20 Am. and Eng. Ency. Law, 475, and citations; *Fisher v. Cockerell*, 5 Pet. 254; *Sargent v. State Bank*, 12 How. 384, 385; *Bronson v. Schultze*, 104 U. S. 412, 413; *England v. Gebhardt*, 112 U. S. 505; *Vandekarr v. The State*, 51 Ind. 95; *Kirby v. Wood*, 16 Me. 82, 83; *Storer v. White*, 7 Mass. 448; *Pierce v. Adams*, 8 Mass. 383; *Sharp v. Daugney*, 33 Cal. 12, 13; *Nichols v. Bridgeport*, 22 Conn. 465, 466; *Newman v. State*, 14 Wis. 430, 431.

This court can not presume as to what may be the statute law of Kentucky in order to validate or strengthen the alleged record. *Hanley v. Donoghue*, 116 U. S. 1; *Renaud v. Abbott*, Id. 277.

H. L. WARREN and W. H. POPE for defendant in error.

The first objection made to the admissibility of the record is not well taken. Rev. Stat. U. S., sec. 905; Const. U. S., art. 4, sec. 1. See, also, *Andrews v. Flock*, 6 So. Rep. (Fla.) 907; *Craig v. Brown*, Pet. C. C. 352.

In the absence of proof to the contrary, it will be assumed that the Kentucky court had jurisdiction of the subject-matter and of all the necessary parties. *Cangran v. Gilman*, 46 N. W. Rep. (Ia.) 1005; 12 Am. and Eng. Ency. Law, 148, and citations.

In this territory the assignment of a judgment to plaintiff Cain was valid, to vest in him the equitable title and the right to maintain this action in the name of the judgment creditors. Comp. Laws, 1884, sec. 1882; 2 Black on Judg., sec. 421 et seq.; also, sec. 951, and citations; Freem. on Judg., sec. 421 et seq., and citations; *Threshing Mach. Co. v. Peterson*, 60 N. W. Rep. 747.

BANTZ, J.—The judgment was recovered in Kentucky by Fonda & Sons against Field and Cain, and it is alleged was assigned by Fonda & Sons to Cain, who brought this action upon it against Field. The judgment was rendered in an action brought in the vice-chancellor's court at Louisville.

The summons commanded Field and Cain to appear in the vice-chancellor's court. An attachment was sued out, and the garnishees were summoned to answer in the Jefferson court of common pleas. It does not appear with certainty whether the judgment was rendered in the vice-chancellor's court or in the Jefferson court of common pleas. The execution recites that it was rendered in the Jefferson court of common pleas. An assignment of this judgment to Cain, purporting to be signed by Fonda & Sons, was filed nearly seven years after the date of the judgment in the Louisville law and equity court. The record was certified under the act of congress, and in the certification it is recited that the Louisville law and equity court is the successor of the vice-chancellor's court, under an act of the general assembly of Kentucky. A recovery was had upon this judgment in the court below, and the cause was brought here on writ of error.

The record of the cause certified from Kentucky, upon which this action was brought, is very confusing. Full faith and credit must, of course, be given to judgments rendered in other states and territories, but just how much or what faith or credit would be given to this judgment in Kentucky would depend upon the statutes of that state. If process summoning a party to appear in one court can authorize a judgment to be rendered against him in another court, and if a new court was created as successor of the one in which process is returnable, it must be by some act of the state legislature. Our courts can not take judicial notice of the statutes of Kentucky. They must be proved as facts in the case. This essential proof was lacking in this case.

The record was not sufficient evidence of the assignment. The genuineness of the signature of Fonda & Sons was not shown, and there was not, and, without notice to Field, there could not be, an adjudication of the genuineness of that signature by the mere filing of the paper nearly seven years after the final judgment was rendered. Indeed, the connection with this action of the Louisville law and equity court, in which the

FOREIGN judgment: assignment of: evidence.

alleged assignment was filed, does not appear by any competent proof. If there be any statute making it evidence it was not shown. It will not be necessary or proper to consider the legal effect of the alleged assignment, as the fact has not yet been established. For these reasons this cause is reversed and remanded with directions to grant a new trial.

Smith, C. J., and Hamilton, J., concur.

[No. 727. October 2, 1897.]

STERN & KRAUSS, Plaintiffs in Error, v. PAUL T.
BATES, Defendant in Error.

JUDGMENT, FOREIGN—SEVEN YEAR LIMITATION—ACT FEBRUARY 24, 1891, LAWS 1891, P. 104, SEC. 2—STATUTORY CONSTRUCTION.—Held: That by section 2, of the act of 1891, it was the intention of the legislature to give holders of foreign judgments, existing at the time of the passage of the act, one year from that date within which to commence their actions, and if not brought within that period, then such actions to be forever barred; and the fact that defendant came into this territory for the first time three years after the time within which the right of action became barred, did not remove the bar, nor interrupt the continuous running of the statute.

ID.—COMP. LAWS, 1884, SEC. 1868—STATUTORY CONSTRUCTION.—Held: That section 1868, Laws 1884, providing that if, after a cause of action accrues, a defendant moves out of this territory, the time during which he shall be a non-resident of the territory shall not be included in computing any of the periods of limitations therein provided, applies to domestic judgments only.

Error, from a judgment for defendant to the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

A. B. McMILLAN for plaintiffs in error.

Plaintiffs' second replication to defendant's third plea, should have been sustained as a valid defense. Comp. Laws 1884, sec. 1868.

The statute did not begin to run in defendant's favor until he became a resident of this territory in 1895. *Fou v. Romberdeau's Ex'r*, 3 Cranch 177; *Sohn v. Watterson*, 17 Wall. 596; *Richardson v. Mackay*, 46 Pac. Rep. 546; *McCann v. Randall*, Id. 598, S. C. 9 A. S. R. 666.

A statute of limitation can not arbitrarily take from a creditor his right to sue without having first given reasonable opportunity to commence suit. *Brown v. Sauerwein*, 10 Wall. 218; *Hanger v. Abbott*, 6 Id. 532; *Montgomery v. Hernandez*, 12 Wheat. 129.

JOHNSTON & FINICAL for defendant in error.

LAUGHLIN, J.—The plaintiffs in error filed this suit as an action in debt on the thirty-first day of October, 1896, in the district court for Bernalillo county, and alleged in their declaration that they were partners doing business under the firm name of Stern & Krauss, and that they recovered a judgment on the fourth day of March, 1888, in the city court of Birmingham, county of Jefferson, and state of Alabama, against this defendant, Paul T. Bates, and R. M. Bates, then partners doing business under the firm name and style of Bates Bros., in the sum of \$993.81, no part of which said judgment has ever been paid; that said defendant, Paul T. Bates, was at the time of the bringing of this suit a resident of said Bernalillo county, N. M., but the residence of the plaintiffs, Stern & Krauss, is not disclosed in the declaration. The defendant appeared, and pleaded: First, the general issue; second, nul tiel record; and, third, the statute of limitations of seven years. The plaintiffs joined issues as to the first and second pleas, and demurred as to the third plea. The demurrer was overruled by the court, and then plaintiffs filed their replication as to the third plea; and alleged: First, that at the time the cause of action accrued to them the defendant was out of this territory, and that he afterwards, during the year 1895, came into this territory, and was for the first time within the jurisdiction of this court since the cause of action accrued, and that they

commenced their suit within seven years next after defendant's arrival into this territory after the accrual of their said cause of action; and, second, that immediately after the cause of action accrued the defendant removed from this territory, and did not return until the —— day of ——, 1895, during all of which time the defendant was a nonresident of this territory, and that said suit was begun within seven years after the cause of action accrued to them, excluding the time the defendant was such nonresident. The defendant filed a motion to strike from the files this replication on the ground of irrelevancy, which motion was sustained; and, the plaintiffs electing to stand upon their pleadings, judgment was entered for defendant. The case is here upon plaintiff's errors assigned to the record.

This is an action in debt, brought upon a judgment obtained by the plaintiffs in error against the defendant in error on the fourth day of March, 1888, in the city

FOREIGN judgment: seven year limitation: statutory construction.

court of Birmingham, in the county of Jefferson, in the state of Alabama, for the sum of \$993.81. This action was commenced on the thirty-first day of October, 1896, in the district court for Bernalillo county, this territory. The defendant in error pleaded the statute of limitations as a bar to the cause of action, and relies upon that statute as a complete defense, which is as follows: "Sec. 2. Actions founded upon any judgment of any court of the territory of New Mexico may be brought within seven years from the rendition of such judgment, and not afterwards, and actions founded upon any judgment of any court of record of any other territory or state of the United States, or of the federal courts, may be brought within seven years from and after the rendition of such judgment, and not afterwards; provided, that actions may be brought upon any existing judgment, which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterwards; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred." Laws 1891, p. 104. This statute was approved

February 24, 1891, and was adopted in lieu of section 1861, Comp. Laws 1884, which is as follows: "Sec. 1861. Actions upon any judgment of any court of record of any state or territory of the United States, or the federal courts of the United States, within fifteen years" after the cause of action accrues. It will be observed that there is no limitation placed upon judgments obtained in New Mexico until by the act of 1891, *supra*, and under the proviso in the statute of 1891 suits might be brought upon any then existing judgment within one year from and after its passage; that is, at any time before the twenty-fourth day of February, 1892, and not afterwards. This proviso limited the time for bringing actions, upon all judgments then existing, whether barred or not, to one year from and after the date of its passage, and was intended to apply to then existing judgments, whether foreign or domestic; and the one year's time given within which to commence actions upon then existing judgments was intended to remove any constitutional objections to the act, and it gave suitors a reasonable time in which to begin their actions. *Terry v. Anderson*, 95 U. S. 628; *Koshkonong v. Burton*, 104 U. S. 668. The seven-years' limitation was intended to apply to all judgments obtained after the act became effective, and it does not apply to the then existing judgments. The ground stated in the plea of the statute of limitations is "that the supposed cause of action in said declaration mentioned did not accrue to the plaintiffs at any time within seven years next before the commencement of this suit." The replication to this plea is that the "defendant, at the time when the said cause of action accrued to the plaintiffs, was out of this territory, and that he, the said defendant, afterwards, to wit, on the — day of —, 1895, came to this territory for the first time since this cause of action accrued." By the replication it is seen that the defendant came into this territory for the first time during the year 1895. The statute began to run on the approval of the act, February 24, 1891, and the plaintiffs had one year from that time within

which to commence their action. This they did not do, because they say that they could not bring their action within the year given in the proviso, for the reason that the defendant did not come into the territory for the first time until about three years after the time within which to commence their action as prescribed in the proviso; and they contend that the statute did not begin to run against them until the defendant became a resident of this jurisdiction. This would be in effect, to hold that a foreign judgment creditor could maintain an action upon his judgment existing at the time the act of 1891 went into effect at any time within fifteen years from the date the right of action accrued under section 1861, *supra*, or at any time within seven years under the act of 1891. The first position would render the act of 1891 nugatory, and the last contention is untenable because the seven-year limitation is applicable only to judgment obtained after the act of 1891 became effective. Both contentions are contrary to the legislative intent, and the two acts, read and construed together, do not support the construction sought to be placed upon them, and we are of opinion that the plea interposed by the defendant below was good, and a bar to the action as stated.

We have been unable to find any decision directly in point, for the reasons that acts of limitation are purely statutory, and the numerous decisions on this subject are rested upon constructions of the particular statutes of the several states to which they refer, and because this appears to be the first case upon this particular statute which this court has been required to consider. It is manifest that the legislative intent was to give holders of foreign judgments existing at the time of the passage of the act one year from that date within which to commence their actions, and, if not, such actions should be forever barred thereafter. The fact that the defendant came into the territory for the first time three years after the time within which his right of action became barred we do not think removed the bar, or interrupted the continuous running of the statute. "A statute of limitations undoubtedly has effect upon actions which have already

accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the legislature to be gathered therefrom." *Sohn v. Waterson*, 17 Wall. 596.

2. The plaintiffs in error set up as a further ground in their replication "that immediately after said cause of action accrued the said defendant removed from this territory, and

COMP. LAWS, sec.
1868, construed.

did not return thereto until the — day of —, 1895, during all of which time the said defendant was a nonresident of this territory. and the cause of action was begun within seven years from the time said cause of action accrued, excluding the time said defendant was a nonresident." This allegation is inconsistent with the ground first stated in the replication for the reason that the first is that defendant for the first time came into the territory during the year 1895, and this allegation is that immediately after the accrual of the cause of action the defendant removed from the territory; and as the judgment was obtained in the state of Alabama, and as the declaration nowhere alleges the residence of the plaintiffs, the presumption would follow that all the parties were nonresidents until the defendant came into the territory during the year 1895. They contend that under this allegation the action was not barred, and cite in support of their contention the following statute of Comp. Laws 1884, to wit: "Sec. 1868. If, after a cause of action accrues, a defendant removes from the territory, the time during which he shall be a nonresident of the territory shall not be included in computing any of the periods of limitation above provided." This is a part of the statute of limitations passed January 23, 1880, and, as before shown, that act did not apply to domestic judgments, but to foreign judgments only. The phrases used in this section with respect to a defendant removing from the territory, and excluding the time while he is a nonresident, are meaningless, and can not apply to foreign judgment debtors. The plaintiffs contend that, upon the allegation last stated this statute was a valid defense. We think not, and

are of the opinion that section 1868, *supra*, does not apply to the cause at bar, in any respect whatever. The statute of 1891, *supra*, which now applies to domestic judgments, must be read into the old statute of 1880, and all construed together; and section 1868 may be construed with the act of 1891, and applied to domestic judgments only. We are of the opinion that the court below properly sustained the motion of defendant in striking out the replication of plaintiffs to their plea of the statute of limitations, and, there appearing no reversible error in the record, the judgment of the court below is affirmed.

Smith, C. J., and Hamilton and Bantz, JJ., concur.

[No. 753. January 5, 1898.]

UNITED STATES OF AMERICA, Appellant, v. THE
RIO GRANDE DAM & IRRIGATION COMPANY
et al., Appellees.

NAVIGABLE STREAMS—OBSTRUCTION—ACTS OF CONGRESS, SEPTEMBER 19, 1890, AND JULY 13, 1892, CONSTRUED.—Held: That the waters of the Rio Grande are not navigable in New Mexico, and can not be said to be navigable waters in respect to which the United States has jurisdiction within the meaning of the acts of congress of September 19, 1890, section 10, and July 13, 1892, section 3, prohibiting the erection of any dam or other structure in the navigable waters of the United States, without permission of the secretary of war; and the construction of a dam across that stream within New Mexico for irrigation purposes, is not in violation of these acts, nor of any law of the United States, nor of any treaty.

Appeal, from a decree for defendants dismissing the bill, from the Third Judicial District Court. Affirmed, all concurring; Hamilton and Laughlin, JJ., in the result.

The facts are stated in the opinion of the court.

W. B. CHILDERS, United States attorney, for the United States.

“Natural falls or other obstructions do not destroy the navigable character of a river above them, if it be navigable.” *Spooner v. McConnell*, 1 McLean, 337; 7 Meyers’ Fed. Dec., sec. 3152; *Escanaba Co. v. Chicago*, 107 U. S. 678; “*The Montello*,” 20 Wall. 430.

It is not necessary that a stream should in fact be navigated to constitute it a navigable stream. “*The Montello*,” 20 Wall. 430 et seq.; *Spokane Mills Co. v. Post*, 50 Fed. Rep. 429; *Shaw v. Oswego Iron Co.*, 10 Ore. 371; *Escanaba Co. v. Chicago*, supra; *Miller v. Mayor*, 109 U. S. 385.

Nor is it necessary that a stream should be capable of such use at all times, to render it navigable. *Brown v. Chadbourne*, 31 Me. 4; *Treat v. Lord*, 42 Id. 150; *Veazie v. Dwinell*, 50 Id. 484; *Lancy v. Clifford*, 54 Id. 489; *Thunder Bay Co. v. Speechy*, 31 Mich. 336; 18 Am. Rep. 184.

Any obstruction to the navigable capacity of any waters in respect of which the United States has jurisdiction, is prohibited by act of congress, and the continuance of any such obstruction made a penal offense unless by permission of the secretary of war. Act September 19, 1890; 26 Stat. Law, 426; Act July 13, 1892, 27 Stat. 110.

A river may be wholly within a state, and yet be a navigable water of the United States. *Escanaba Co. v. Chicago*, 107 U. S. 678, and “*The Montello*,” 20 Wall. 430, supra.

The mere settlement upon public lands gives no rights as against the government. *Frisbie v. Whitney*, 9 Wall. 187; *The Yosemite Case*, 15 Id. 77; *Shepley v. Cowan*, 91 U. S. 330.

The common law as to water rights is in force in New Mexico. *Walker v. Railroad Co.*, 165 U. S. 593.

W. A. HAWKINS, S. B. NEWCOMB and A. B. FALL for appellees.

As to the matter of judicial notice, see: U. S. v. Lawton, 5 How. 25; 12 Am. and Eng. Ency. of Law, 151; Brown v. Piper, 91 U. S. 41; Conger v. Weaver, 6 Cal. 557.

As to what constitutes a navigable stream, see: "The Daniel Ball" Case, 10 Wall. 557; "The Montello" Case, 20 Id. 431. See, also, Rep. on Irrigation (U. S. Dept. Agri.), 1893; 11 Ann. Rep. Geol. Sur., part 2, maps; Id., p. 54.

As to the question of where authority over the navigable waters of the United States (over which congress has not directly assumed control) is lodged, see: Pound v. Turk, 95 U. S. 463; also, Wilson v. Blackbird C. M. Co., 2 Pet. (U. S.) 250.

Not only the right of appropriation of navigable waters, but the right to the local control by the states and territories of such waters, has been repeatedly recognized by congress and confirmed by the courts. Rev. Stat. U. S., sec. 2339; Supp. Rev. Stat., p. 946, Mar. 3, 1891; Act Feb. 26, 1897; Atchison v. Peterson, 20 Wall. 508; Basey v. Gallagher, Id. 670.

As to the construction of section 10 of the Act of 1890, see: U. S. v. Hall, 63 Fed. Rep. 473; U. S. v. Marthinson, 58 Id. 765.

The application of the Rio Grande Dam & Irrigation Company for government sites vests in it a right to such sites for use as reservoirs. 91 U. S. Rep. 338.

It will not be presumed that congress intended by a later act to take away the rights so given, unless the intention to do so is clear and explicit. Frost v. Wenie, 157 U. S. 58; State v. Sturges, 10 Ore. 58; Endlich on Interpt. Stat. 298-303.

SMITH, C. J.—This is a suit in equity brought by the United States to restrain the Rio Grande Dam & Irrigation Company from constructing or maintaining a dam across the

Rio Grande river, in the territory of New Mexico. The structure especially aimed at is a dam projected and about to be built by the defendant company at a point called "Elephant Butte," the object of which is to take water from the river, and store it in reservoirs, for the purpose of irrigation. The ground upon which the claim of the government is predicated is that the Rio Grande is a navigable river, and that the proposed dam will obstruct the navigation of the river, the flow of waters therein, and interfere with its navigable capacity; and that such obstructions would be contrary to the treaty with Mexico, and in violation of the acts of congress. A preliminary injunction was granted, and defendant ordered to show cause why it should not be continued. The defendant answered, denying that the Rio Grande is a navigable river, and also filed pleas justifying under its right of way for canals and reservoirs secured under the act of congress of 1891 and certain territorial laws. Upon the hearing the court below held that upon the facts presented by affidavit, as well as other facts of which it took judicial notice, the Rio Grande is not a navigable stream within the territory of New Mexico, and that the bill does not state a case entitling it to the relief prayed; and, upon the complainant's declining to amend its bill further, the court dissolved the injunction and dismissed the bill. From that judgment the United States appealed to this court.

The right of the United States to prevent the construction of the irrigation works in question is sought to be deduced chiefly from two acts of congress, viz.: (1)

NAVIGABLE
streams: obstruction: acts of Congress, Sept. 19, 1890, and July 13, 1892, construed.

Act September 19, 1890, sec. 10, which prohibits "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect to which the United States has jurisdiction." (2) Act July 13, 1892, sec. 3, which declares that it shall not be lawful "to build any * * * dam, weir * * * or structure of any kind * * * in any navigable waters of the United States * * * without the permission of the secretary of war, in any port, roadstead, haven, harbor, navigable river, or

other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said water." Some allusion has been made to the treaty of Guadalupe Hidalgo of 1848, between the United States and Mexico, as containing stipulations which would be violated by permitting the contemplated construction to proceed. The only provision of that treaty bearing upon this subject simply provides, in article 7, that the part of the Rio Grande lying below the southern boundary of New Mexico is divided in the middle between the two republics, and that the navigation below said boundary "shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right." Manifestly, this applied only to that portion of the river below the boundary of New Mexico, for the same article contains the further qualifying clause that "the stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits." Furthermore, the treaty of 1853, known as the "Gadsden Treaty," contains an express provision that the stipulations and restrictions of the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Grande "below the intersection of the 31 degree, 57 min., 30 sec., parallel of latitude with the boundary line established by that treaty." There is no undertaking by either of the parties to these treaties that the Rio Grande is, or shall continue to be, navigable. All that either agreed to in this connection was that it would not construct below the point of intersection of the above-mentioned parallel of latitude, which is about that of El Paso, any work which would interfere with the common use of the river. No obligation devolved upon the United States to conserve the waters of the river above that point for the purpose of facilitating navigation below it.

We think the whole question turns upon the applicability of the acts of congress above mentioned. By their express terms these acts deal only with navigable waters. Unless the

Rio Grande is a navigable stream, and its "navigation," or "navigable capacity," will be obstructed by the proposed dam, these statutes do not apply to the case, and can not be invoked to enable the government to stop the progress of the work by injunction. It is alleged in the original bill that the Rio Grande, from and including the site of the proposed dam, has been used to float logs for commercial and business purposes, and for affording a means for commercial traffic within and between the territory of New Mexico and the state of Texas and the republic of Mexico. In the amended bill it is alleged that the said river is susceptible of navigation for commercial purposes up to La Joya, in the territory of New Mexico, about one hundred miles above Elephant Butte. In both the river is alleged to be navigable at certain points below El Paso. It is conceded that the navigability of waters is a matter of which courts take judicial notice. The record contains a large mass of information, in the form of maps, reports of exploring and surveying expeditions made under the direction of the war and interior departments, and also reports of officers specially detailed to investigate the feasibility of rendering the river commercially navigable by improvements, and also its capability of supplying reservoirs for irrigation. From these and other data the following facts, as stated in the opinion of the court below, are well established:

The course of the Rio Grande in New Mexico is through rocky canons and sandy valleys. In the valley it spreads out, shallow and between low banks, over fine, light, sandy soil, of great depth. Bars are continually forming, passing away, and reforming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from four to fifty-two feet to the mile, and the changes in its course are rapid, continual, and often radical. The valley is scarred with low ravines made by its progress in different places. In all the period of time only two instances were shown when the river was actually utilized for the conveyance of merchandise, and these were of timbers. One of these instances occurred in 1858 or 1859, when a raft was sent down from Canutillo to

El Paso, a distance of twelve miles; and the other recently, when some telegraph poles were floated from La Joya a "short distance." "The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand, and in times of low water the stream divided into a number of minor channels, and apparently a large percentage of the water is lost in these great deposits of fine material." 12 Ann. Rep. Geol. Sur. 204. "From Bernalillo, N. M., to Ft. Hancock, Tex., the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year, and a small stream during the remainder of it." 10 Ann. Rep. Geol. Sur., p. 99. "From personal observation, I know that these seasons of flood and drouth (in the Rio Grande) were of about the same character thirty years ago." Maj. Anson Mills, 10 U. S. Cav. Rep. Spec. Com. Sen., volumes 3, 4, p. 39. But, what is of more importance, we have reports of officials upon the exploration of the river, made under the direction of the government, for the special purpose of considering its navigability. From these it appears: "The stream is not now navigable, and it can not be made so by open channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks, and the small discharge do not encourage the belief that such improvement would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. * * * In my judgment, the stream is not worthy of improvement by the general government." Report of O. H. Ernst, Major of Engineers, to Secretary of War, 1889. Again: "I consider the construction, not only of an open river channel, but of any navigable channel, to be

impracticable. * * * During the greatest part of the year, when the river is low, the discharge would be insufficient to supply any navigable channel, except, perhaps, a narrow canal with locks, the construction of which, on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable." Report of Gerald Bagnall, Assistant Engineer, to Secretary of War, 1889.

The navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditure of vast sums of money, but upon its natural present conditions. In *The Daniel Ball*, 10 Wall. 557, the supreme court says: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used, in the ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." In *The Montello*, 20 Wall. 431, the court says: "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact, and becomes a public river or highway. * * * The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." The court approves the language of Chief Justice Shaw in *Rowe v. Bridge Corp.*, 21 Pick. 344, who said: "In order to give it the character of a navigable stream, it must be generally and commonly useful to some trade or agriculture." See, also, *Morrison v. Coleman*, 6 South. Rep. (Ala.) 374. Of course, it need not be perennially navigable, but the seasons of navigability must occur regularly, and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse. While the capacity of a stream for floating logs, or even thin boards, may be considered, yet the essential quality is that the capacity should be such as to subserve a useful public purpose. Ang. Water Courses, 335. In a recent case the supreme court of Oregon says (*Haines v. Hall*, 20 Pac. Rep. 835), per

Thayer, C. J.: "Whether the creek in question is navigable or not for the purposes for which appellant used it depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such, and its length and capacity so limited, that it will only accommodate but few persons, it can not be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity, as will enable it to accommodate the public generally as a means of transportation." And in the same case, Lord, J., said: "It must be susceptible of beneficial use to the public," be "capable of such floatage as is of practical utility and benefit to the public as a highway." And of the stream then in question he says: "It is not only not adapted to public use, but the public have made no attempt to use it for any purpose." *Haines v. Hall* (Oregon), 3 L. R. A. 609. The supreme court of Alabama says: "In determining the character of a stream, inquiry should be made as to the following points: Whether it be fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use, beneficially to the public." *Rhodes v. Otis*, 3 Ala. 578; *Peters v. Railroad Co.*, 56 Ala. 528. Indeed, in the letter of inquiry by the Honorable Richard Olney, secretary of state, in respect to the facts as to the navigability of the Rio Grande, in interstate commerce, among other essential qualities, he says: "It should be remembered that a mere capacity to float a log or a boat will not alone make a river navigable. The question is whether the river can be used profitably for merchandise. I have been informed that wood is sometimes brought down the river to Ciudad Juarez, in flatboats, and that logs are rafted or floated down from the timbered lands on the upper river, for commercial purposes." Letter January 4, 1897. The secretary of state seems to have been misinformed as to such use for commerce. This letter was addressed to Col. Anson Mills, at

whose request it appears that applications for right of way for irrigation by the use of waters of the Rio Grande, and all its tributaries, were suspended throughout New Mexico and Colorado. The answer of Col. Mills deals almost wholly with the river internationally. The river in its relation to interstate commerce is dismissed by him with the instance of the floating of a raft of logs, in 1859, from a point eighteen miles above El Paso, and the qualifying remark, "It would now hardly be practicable to do so." Letter January 7, 1897.

It is perfectly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse in any manner whatever, and that it is not now capable of being so used. On the other hand, it has been, from the earliest times of which we have any knowledge, used as a source of water for irrigation. Its valley has always been the center of population in New Mexico. It was the first portion of this region to be occupied and settled by civilized men, and the population of this valley has always been, and is now, absolutely dependent for means of livelihood and subsistence upon the use of the waters of this river for irrigation of their fields and crops. Dams have been erected and maintained at El Paso for nearly 200 years, by which the river has been obstructed, and its waters diverted for irrigation to both sides of the Rio Grande. But never until the present time, so far as we can ascertain, has any question been raised by any one as to interference with any use of the river for purposes of navigation. Indeed, it appears from the affidavits and reports presented in support of the bill in this case that the objection now raised to the construction of the defendant's dam grows out of the proposed construction of an international dam and reservoir at El Paso, to be constructed under the auspices of the two governments. The investigation of the feasibility of such an international dam and reservoir is being made on behalf of the United States under the authority of congress, thus evincing the deliberate intention of the government, by its political department, to take measures, not for the purpose of improving the navigability of this river, but of permanently obstructing it

at a point far below the site of defendant's works, and thus to devote the stream to irrigation instead of navigation. One of the affidavits in support of the bill is made by the commissioner of the United States engaged upon this investigation, the object of which he states to be "the study of a feasible project for the equitable distribution of the waters of the Rio Grande to all persons residing on its banks or tributaries, having equitable interests therein." And he also states in one of his reports that "the probable flow of water in the river here (El Paso) is likely to be ample for the supply of the proposed international reservoir, * * * but that the flow will not be sufficient to supply the proposed international reservoir here and allow for the supply for the proposed reservoir of the Rio Grande Irrigation Company, at Elephant Butte, in New Mexico, or any other similar reservoirs in New Mexico, and but one of these schemes can be successfully carried out." That is to say, in order to render feasible the storage of water for irrigation at El Paso, it is essential to prohibit all similar structures along the river at points above.

From these extracts it seems clearly apparent that the work at El Paso to which the United States has committed itself, tentatively at least, is not designed to preserve or improve the navigable capacity of the river, but to facilitate the distribution of the waters which may be gathered by obstructing the stream for the benefit of riparian occupants, and that the object of this proceeding is not to secure a public benefit from the navigation of the Rio Grande, but rather, under the guise of a question of navigability of the stream, to obtain an adjudication of the interests of rival irrigation schemes, in aid of one locality against another. Manifestly, neither the acts of congress cited nor the provisions of the treaty, have any application to questions of this kind, and they can not be invoked to settle conflicting local interests, whose determination must necessarily depend upon entirely different considerations.

The Rio Grande, as we have said, flows through a region dependent upon irrigation. It is a part of what is known as the arid region of this country, embracing, according to the

report of the director of the geological survey, about four-tenths of the entire area of the United States in which the rainfall is not sufficient for the production of crops. Here the paramount interest is not the navigation of the streams, but the cultivation of the soil by means of irrigation. Even if, by the expenditure of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose would be subserved by it. Ample facilities for transportation, adequate to all the requirements of commerce, are furnished by the railroads, with which these comparatively insignificant streams could not compete. But, on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and, if such use were denied them, it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity. These conditions have been distinctly recognized in the legislation of congress; for while it has refrained from any attempt to render streams like the Rio Grande navigable by artificial works, and has not in any way treated them as navigable waters, congress has, by the reservation or survey of reservoir sites along its valley, and the appropriation of large sums of money for the prosecution of investigations and surveys to this end, clearly indicated its purpose to treat these waters as suitable only for irrigation, and to consider such a use of them as the one of commanding importance.

The riparian rights of the United States were surrendered in 1866. R. S., sec. 2339. Prior to that time it had become established that the common-law doctrine of riparian rights was unfitted to the conditions in the far West, and new rules had grown up, under local legislation and customs, more nearly analogous to the civil law. Recognizing that the public domain could not be utilized for agricultural and mining purposes without the use of water applied by artificial means, and that vast interests had grown up under the presumed license of the federal government to the use of such waters,

congress confirmed the rights of prior appropriation of waters by the act above mentioned, where the same "are recognized and acknowledged by the local customs, laws and decisions of the courts." Section 2339. The supreme court of the United States, in passing upon this act, observes: "It is evident that congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition." *Atchison v. Peterson*, 20 Wall. 507; *Basey v. Gallagher*, Id. 671. And since 1870 patents for lands expressly except vested water rights. Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region, under local regulative control. Following in line with the act of 1866, the act of 1877 authorized the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them. This act again distinctly recognized the validity of the right of prior appropriation, and also provided that "all surplus water over and above such actual appropriation and use together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights." This act was limited to states and territories in the arid region. 1 Supp. Rev. St., p. 137. Colorado was included in 1891. Id., pp. 941, 942. By the act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation. It provided for the selection of sites for reservoirs for the storage and utilization of water for irrigation, and the prevention of overflows, and that the lands designated for reservoirs, ditches, or canals, and all lands susceptible for irrigation therefrom, be reserved from sale or entry. Id., p. 698. In 1890 the reservation from sale or entry of lands, except as to reservoir sites, was repealed. Reservoir sites remained segregated. Id., pp. 791, 792. In the same year it was pro-

vided that patents for lands west of the 100th meridian should reserve the right of way for ditches and canals. *Id.*, p. 792. In 1891 public lands were opened to private location for the right of way to the extent of the ground occupied by the water of the reservoir, canals and laterals and fifty feet on the margin. In this act it was provided that "the privilege herein granted shall not be construed to interfere with the control of the water for irrigation and other purposes under authority of the respective states or territories." *Id.*, p. 946. On the twenty-sixth day of February, 1897, congress opened the reservoir sites, reserved by the government under the act of 1891, to private location, and the local legislators were authorized to prescribe rules and regulations and fix water charges. 18 Decisions Department Interior, p. 168.

Considering the discussions in congress, the reports of committees, and the labors and reports of officials in the interior and war departments, made under congressional directions, it seems quite manifest that the purpose by the federal government to hold and further redeem the great arid region had become the recognized policy and the measure of the highest public importance and necessity. It would seem that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment, temporarily, at least, and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but, such as it is, reservoir sites have been located, surveyed, and established along the streams, navigable and non-navigable, under the immediate direction of government officials and by authority of congress, and the right to make private entries of others, under the supervision of the secretary of the interior, is also authorized. Ruins of extensive irrigation systems, scattered all over New Mexico and Arizona, of a prehistoric people, show that conditions which have confronted the present age were conditions encountered in the remote past, and apparently overcome. The

cultivation of the Rio Grande valley by acequias from the river is mentioned by the earliest of Spanish priests and explorers, and is established by authentic historical memorials, extending back more than two centuries. The law of prior appropriation existed under the Mexican republic at the time of the acquisition of New Mexico, and one of the first acts of this government was to declare that "the laws heretofore in force concerning water courses * * * shall continue in force." Code proclaimed by Brigadier General Kearney, September 22, 1846. One of the first acts of the local legislature (1852) after the organization of the territory provided that "all rivers and streams of water in this territory, formerly known as public ditches or acequias, are hereby established and declared to be public ditches or acequias." Comp. Laws, sec. 6. In 1874 it was provided that "all of the inhabitants of the territory of New Mexico, shall have the right to construct either private or common acequias, and to take the water for said acequias from wherever they can, with the distinct understanding to pay the owner through whose land said acequias have to pass, a just compensation for the land used." Comp. Laws, sec. 17. In 1887 an act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake, or spring, provided it does not interfere with prior appropriations. Sess. Acts 1886-87, chap. 12. Other acts have been passed since upon the subject, in regard to the acquisition of water rights. But this legislation is not peculiar to New Mexico. Its general characteristics are common throughout the west, where the doctrine of prior appropriation prevails. This was the character of local legislation which congress recognized, confirmed and authorized by the various acts to which reference has been made. The doctrine of prior appropriation has been the settled law of this territory by legislation, custom and judicial decision. Indeed, it is no figure of speech to say that agriculture and mining life of the whole country depends upon the use of the waters for irrigation, and, if rights can be acquired in waters not navigable, none can have

greater antiquity and equity in their favor than those which have been acquired in the Rio Grande valley in New Mexico.

It is contended that, because the Rio Grande is capable of navigation to a limited extent several hundred miles below the point of the proposed dam, its construction will, by arresting the flow of water in the stream, interfere with its navigable capacity, and that it is therefore prohibited by the act of 1890. From the foregoing discussion of the legislation of congress, and the conditions prevailing in the region under consideration, it would seem to follow that, if there were a conflict between the interests of navigation and agriculture in relation to a stream like the Rio Grande, that of the latter would prevail. Certainly, it should be held to be under the protection of the courts against any doubtful interpretation or application of a penal statute. If the waters of the Rio Grande are not navigable in New Mexico, which we hold to be the case, then they can not be said to be waters in respect of which the United States has jurisdiction. And certainly, in the absence of some express declaration to that effect, it can not be supposed that congress intended to strike down and destroy the most important resource of this vast region, in order to promote the insignificant and questionable benefit of the navigation of the Rio Grande for a short distance above its mouth; for the construction contended for does not limit the prohibition of the act of congress to the works proposed by the defendant. It applies to the maintenance, as well as the original creation, of obstructions. If defendant's dam at a point where the river is not navigable, is an obstruction to the navigable capacity of the river several hundred miles below, the same must be said of every dam and irrigation ditch which diverts water from the river or any of its confluent to their primary sources. If, upon this ground it is competent for the United States to prohibit the erection of defendant's dam, it is equally competent for it to compel the removal of every dam and headgate heretofore constructed in the Rio Grande and its tributaries, and prohibit the use of their waters for irrigation

throughout this entire valley. It is true that courts must administer the law as they find it, and, if it is clear and free from doubt, the consequences, however disastrous, can not be considered as affording grounds for non-enforcement. But in a case like this, where it is sought by intendment, to give to the statute a meaning not apparent on its face, it is the duty of the courts to give full weight to these considerations in determining what was the intention of congress; and in view of the condition and history of the region which would be affected, the unimportance of the Rio Grande as a water way for commercial intercourse at any point, its non-navigability at the place of the proposed construction and for hundreds of miles below, and the evident purpose of congress, by its legislation, to promote irrigation throughout this portion of the country, even to the extent of further obstruction of this very stream. It would, in our opinion, be unreasonable to hold that legislation, which has a definite and well understood purpose, in furtherance of the public interest in those portions of the country to whose conditions it is applicable, was intended to operate to the detriment of the public interests in regions to whose conditions it is not applicable, and where its enforcement would be destructive of the very interests which the legislation of congress has otherwise undertaken to promote.

We, therefore, hold that the work sought to be enjoined in this action is not in violation of any law of the United States, or any treaty, and that the judgment of the district court dissolving the injunction and dismissing the bill should be affirmed; and it is so ordered.

Hamilton and Laughlin, JJ., concur in the conclusion reached.

[No. 720. January 11, 1898.]

THE DENVER & RIO GRANDE RAILROAD COMPANY, Plaintiff in Error, v. THE UNITED STATES OF AMERICA, Defendant in Error.

WRIT OF ERROR—ABSENCE OF BILL OF EXCEPTIONS—MOTION TO DISMISS WRIT—SUFFICIENCY.—It is no ground for the dismissal of a writ of error, that, the assignments of error being based upon alleged errors occurring during the trial, and none upon the record proper, there is no bill of exceptions upon which they can be based. In *Rogers v. Richards*, 8 N. M. 658, and in *Insurance Co. v. Walker*, decided at this term, this court, in effect, held the absence of a motion for new trial to be the absence of a bill of exceptions, but in neither case ruled that the writ of error should be dismissed.

Id.—BILL OF EXCEPTIONS—SUFFICIENCY.—Where a bill of exceptions recited that it contained certain things, including “the notes of the testimony of witnesses, as taken down by counsel,” at the trial, though it did not contain all the evidence introduced on the trial; and the certificate of the trial judge recited that the bill was “signed, settled and sealed as a bill of exceptions, and made part of the record in the cause,”—Held: That it was sufficient.

Error, from a judgment for plaintiff, to the First Judicial District Court. Motion to dismiss writ of error. Overruled.

WOLCOTT & VAILE, and E. L. BARTLETT and WILLIAM W. FIELD for plaintiff in error.

A bill of exceptions is not required to contain all the evidence, but only so much thereof as is pertinent to the rulings which the plaintiff in error seeks to have reviewed, and as is necessary to enable the appellate court to fully understand the circumstances and conditions under which each particular ruling was made. *Laws*, N. M. 1889, chap. 1, sec. 3; *Witt v. Cuenod*, decided October 2, 1897. See, also, *Ironwood Store Co. v. Harrison*, 75 Mich. 197; *Snyder v. Moon*, 49 Pac. Rep. 327; *Stout v. Woods*, 79 Ind. 108.

W. B. CHILDERS, United States district attorney, and ANDRIEUS A. JONES, special assistant United States attorney, for the United States.

None of the instructions given or refused are based upon any of the documentary evidence, but upon the testimony of witnesses. It is not certified that any of the testimony appearing in the transcript is accurate, nor that it contains all of the testimony upon any given proposition; and, so far as these instructions are concerned, the record is in precisely the same condition as if no bill of exceptions had been filed. This court can not consider the exceptions of counsel to the giving or refusing of these instructions. *Worthington v. Mason*, 101 U. S. 149; *United States v. Watts*, 1 N. M. 561. See, also, 3 *Ency. Pl. and Prac.* 420, note; *Russell v. Ely*, 2 Black 580; *Martin v. Force*, 3 Colo. 200; *Porter v. Walker*, 1 Ia. (Cole) 456; *Potter v. Wooster*, 10 Ia. 335; *Richards v. Fanning*, 5 Ore. 362; *State v. Lee Yan Van*, 10 Id. 367; *Craig v. Young*, 2 Colo. 113; *McGavick v. Ward*, Tenn. (Cook) 405; *Brown Bros. & Co. v. Forrest*, 1 Wash. 203; *Railroad Co. v. Wagner*, 19 Kan. 339; *Commonwealth v. Arnold*, 161 Pa. St. 320 (29 Atl. Rep. 270).

In the certificate of the trial judge it is stated that the bill of exceptions does not contain the objections of counsel to the evidence, nor the rulings of the court thereon. Though improper evidence may appear in a case, unless timely and proper objections are made to its introduction, the admission of such evidence is not error. *Maxwell Land Grant Co. v. Dawson*, 7 N. M. 133.

The court can not determine whether the books were proper evidence or not, unless they are made a part of the record in this case by a bill of exceptions. *Sewell v. Eaton*, 6 Wis. 490.

SMITH, C. J.—The motion to dismiss the writ of error is upon the ground, in effect, that the assignments of error being all based upon alleged errors occurring during the trial,

and upon the record proper, there is no bill of exceptions here upon which these assignments can be based.

• **ABSENCE of bill of exceptions: motion to dismiss writ of error: sufficiency.**

At this term this court did, in the case of Insurance Co. v. Walker, upon motion, strike out the bill of exceptions; and afterwards, the cause coming up for a hearing, there was an affirmance of the judgment of the lower court because there was no error in the record proper. In the case of Padilla v. Territory (N. M.) 45 Pac. Rep. 1120, there was affirmance because there was no exception saved upon the trial of the case in the lower court, and the record proper supported the judgment of the lower court. In Rogers v. Richards, 47 Pac. Rep. 719, there was no assignment of error, except upon the giving and refusing of instructions; and we held there was nothing before the court for review, because there was no motion for a new trial. The absence of a motion for new trial was, in effect, held in Insurance Co. v. Walker and Rogers v. Richards, *supra*, to be the absence of a bill of exceptions, but in neither was it ruled that the writ of error should be dismissed. The motion to dismiss the writ of error should therefore be overruled.

Counsel have, however, discussed the various assignments of error, to ascertain how they are separately affected by the state of the record. It appears that all of these assignments are upon errors alleged to have occurred upon the trial of the case, no point being raised upon the record proper; and, if

WRIT of error: bill of exceptions: sufficiency.

there is nothing here to be considered as a bill of exceptions, they would, of course, fall to the ground. Defendant in error contends that this bill is, in effect, no bill of exceptions, because it affirmatively shows that it does not contain all the testimony introduced upon the trial, and that it does not show, either affirmatively or presumptively, that all of the evidence sufficient for the determination of any or either of the errors assigned is in the transcript. This bill of exceptions is claimed to be good under the provisions of the act of 1889, chap. 1. "An act with reference to practice in the supreme court and other purposes," the purpose and scope of which we had occasion

to consider in the case of *Witt v. Cuenod*, 50 Pac. Rep. 328; that being an equity case, on appeal in which there was not, nor required to be, a bill of exceptions. In such a case it could not be claimed, if all the testimony was not sent up, that error dependent upon a question of fact would affirmatively appear, so as to overcome the presumption of correctness in the decision of the lower court, and so we held. A distinction is claimed to exist, however, in a law case, by the fact of the bill of exceptions being settled by the trial judge. It is said that the settling of such a bill is an affirmative statement of the trial judge that all of the evidence necessary to a review of the cause is found in the bill. This position we believe to be true, so far, at least, as applied to assignments of error on grounds stated in the motion for new trial, if the certificate of the trial judge is in general terms, and it does not appear on the face of the bill itself that evidence necessary for consideration of the error assigned has been omitted. Thus, we held at this term, in the case of *Mining Co. v. Hendry*, 50 Pac. Rep. 330, that we could not consider the instruction of the trial judge to assess plaintiff's damages at a given sum, because the transcript showed that the evidence upon which the instruction was given was omitted from the record. The certificate of the judge settling the bill of exceptions in this case is not in ordinary or general form. It does not specifically say that the bill contains all the evidence necessary for a review of the cause, nor does it say it was insufficient for such review. It is even contended by counsel for the defendant in error that the certificate does not show that the bill contains, in any true sense, the testimony, or any part of it, given upon the trial. Let us look at the certificate. It recites that the foregoing pages contain certain described stipulations, acts of congress, appointment of an agent of defendant, requested instructions, instructions given, exceptions to instructions, motion for new trial, and "also the notes of the testimony of witnesses, as taken down by counsel for said defendant upon the trial of said cause; but the same does not contain all the evidence introduced upon the trial of said cause, nor the objections of

counsel thereto, nor the rulings of the court thereon; also, the objections, amendments and motions of plaintiff regarding the proposed bill of exceptions offered by the defendant." The certificate then closes as follows: "And because the foregoing matters are not a part of the record in said cause, and the said defendant having applied to the court to sign, settle and seal the same as a bill of exceptions, and thereby be made a part of the record in said cause. It is therefore considered and adjudged by the court that the foregoing be, and is hereby signed, settled and sealed as a bill of exceptions, and made a part of the record in said cause." We had occasion, in *Rogers v. Richards*, supra, to define a "bill of exceptions;" and, speaking of what it should embrace, we said, among other things, that it "should contain all evidence necessary to an understanding of the exceptions," and, we perhaps should have added, "and a review thereof." To "settle a bill of exceptions" would not mean to approve, as occurring on the trial, something merely claimed to have so occurred, but to do so is for the judge to assert officially that it did occur. Therefore we take it that the judge has, by settling this bill of exceptions, and by order judicially making it "a part of the record in said cause," declared that "the notes of the testimony of witnesses, as taken down by counsel," was the testimony given on said trial. What effect has the statement made by the judge that "the bill does not contain all the evidence introduced upon the trial?" We do not see that it has any effect, as disparaging the sufficiency of what he has approved as a bill of exceptions. The judge had a right and a duty to settle the bill of exceptions. To "settle" means to approve; and if, on the face of the settled or approved bill of exceptions, it does not affirmatively appear that there is omitted evidence necessary for a determination of the error assigned, it should be held sufficient. Does this bill of exceptions show that it is insufficient for review of the errors? As to this we will content ourselves with saying that some of the alleged errors, at least, may certainly be reviewed; and we will permit such

contention to be made as counsel are advised on this subject on the argument of the cause on its merits. The motion to dismiss is overruled.

Hamilton and Bantz, JJ., concur.

[No. 739. January 11, 1898.]

A. W. RICE, Appellees, v. JOHN W. SCHOFIELD,
Receiver, et al., Appellants.

EVIDENCE—TAKING OF TESTIMONY BEFORE MASTER—ADJOURNMENTS, WITHOUT NOTICE.—Where it appeared from the report of a master that he began the taking of testimony, and adjournments were had from time to time until a certain date, after which there were no adjournments, yet the taking of testimony was resumed, without notice to the parties in interest that it would be resumed, or a waiver of such notice by the appearance of the parties, it was error to receive such testimony.

ID.—BOND—JUDGMENT WITHOUT NOTICE.—Where a paper purporting to be a "bond" filed in a cause pending the hearing, conditioned to answer any judgment that might be recovered against the principal, did not appear to have been acknowledged before the court or judge, and the persons purporting to be sureties on the bond were not before the court, were not parties to the cause, nor given any notice of the proceedings against them, a judgment against such persons was unauthorized and erroneous.

Appeal, from a judgment for plaintiffs, from the Second Judicial District Court, Bernalillo County. Reversed and remanded.

The facts are stated in the opinion of the court.

CHILDERS & DOBSON for appellants.

A. B. McMILLEN for appellees.

BANTZ, J.—Leaving out of question the sufficiency of the notice given by the master to bring the parties before him,

and assuming that he made a clerical mistake in reporting that he began taking the testimony on the twenty-fifth of October, instead of the thirty-first, his record discloses

**TAKING of testi-
mony before mas-
ter: adjourn-
ments, without
notice.**

that, while adjournments were had from time to time until November 4th, there is none on or after that date, and yet the further taking of testimony was resumed November 11th (written October 11th, but probably another clerical mistake), when Bullock and Champion testified. There was no adjournment made to the eleventh, nor was there any notice given to the parties in interest that such taking of testimony would be resumed, nor did they waive it by an appearance without such adjournment notice or appearance, it was clearly error to receive such testimony. Parties can not be expected to know, at their peril, that testimony may be taken at the master's office, when neither an adjournment nor notice advises them of it.

2. It appears that pending the hearing, a paper purporting to be a bond to answer any judgment Champion might recover was "filed" in the cause, and after the master's

report was confirmed, the court rendered judgment against the persons purporting to be sureties on the bond. The bond does not appear to have been acknowledged before the

**BOND: judgment,
without notice.**

court or judge. It is manifest that these persons never were in any sense before the court. They were not parties to the cause, and were not given any notice of the proceedings against them. If the signatures were forgeries, or if the paper had never been delivered, these persons were given no opportunity to avail themselves of such defense. "It is an acknowledged general principle that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principle of natural justice that no man's right should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right." *Hollingsworth v. Barbour*, 4 Pet. 466. To argue, that, by the terms of the bond, they consented to become parties, to submit to the jurisdiction of the court and to the

rendition of the judgment by it, is to assume they have consented. As to whether they have consented is the very point which the court had no power to determine in their absence. Whether a bond so "filed" in a cause can be enforced at all without a new and independent action, it is unnecessary to decide at this time. For these reasons the cause is reversed and remanded for trial anew.

Smith, C. J., and Laughlin and Hamilton, JJ., concur.

[No. 718. August 16, 1898.]

BROWNE & MANZANARES COMPANY, Plaintiff in
Error, v. FRANCISCO CHAVEZ, JR., Defendant
in Error.

SYLLABUS BY THE COURT.

JUDGMENT—REVIVAL—SCIRE FACIAS—LIMITATION.—A judgment barred by statute of limitations of seven years, section 1861, Compiled Laws 1897, can not be revived by *scire facias*.

Error, from a judgment for defendant, to the Second Judicial District Court, Bernalillo County. Affirmed.

CHILDERS & DOBSON for plaintiffs in error.

B. S. RODEY for defendant in error.

A judgment can not be revived under our statutes more than seven years after its rendition. Comp. Laws, secs. 1860, 1861; Session Laws 1891, secs. 1, 2, chap. 53.

Our legislature amended the common law rule as to executions. Laws 1887, chap. 61, p. 213.

A judgment can not be revived, so as to be given life, for a period of fifteen or twenty years. *Vick v. Justice*, 31 Miss. 201. See, also, *Stewart v. Justices*, 47 Fed. Rep. 482.

A *scire facias* is in many ways in the nature of a suit. *Bryant v. Smith*, 7 Cald. (Tenn.) 113; *Kirkland v. Krebs*,

34 Md. 93; Bilbo v. Allen, 4 Heisk. (Tenn.) 31; Havard v. Randall, 58 Vt. 564; 21 Am. and Eng. Ency. of Law 856, note 1, and citations; Potter v. Tittcomb, 13 Me. 40; Underhill v. Devereux, 2 Saund. 71, note 4; Wright v. McNutt, 1 T. R. Rep. 38; Atwood v. Burr, 2 Salk. 603; Clark v. Paine, 11 Pick. 66; Gonigal v. Smith, 6 Johns. 106; 2 Coke on Littleton, sec. 505; Poultney v. Townson, 2 W. Black, 1277; Gray v. Jones, 2 Wills. 251; Fenno v. Evans, 1 T. R. Rep. 267; Grunway v. Dare, 6 N. J. Law 306.

McFIE, J.—On the seventh day of October, 1885, the firm of Browne & Manzanares Co. recovered judgment against Francisco Chavez, Jr., for the sum of \$4,170 and costs in the district court of Bernalillo county.

On the thirtieth day of September, 1895, and nearly ten years after said judgment was rendered, a precipe was filed with the district clerk for a writ of scire facias to revive the judgment and for execution. The writ was issued and served by the sheriff on September 30th, and was returnable October 5th.

On October 5th the defendant filed written appearance, and on October 7th filed two pleas, the first suggesting the death of Browne, one member of the firm, since the rendition of the judgment, and the second, a plea of the statute of limitation of seven years, in bar of the action.

The plaintiffs below demurred to the pleas but the demurrer was overruled.

Afterwards a motion was filed by plaintiff below to reopen the case for reargument of the demurrer, which motion was sustained by the court, and the cause was set down for reargument January 10th as to the second plea only. The first plea appears to have been abandoned, as also the demurrer thereto.

The court again overruled the demurrer to second plea, and, the plaintiffs declining to plead further, the writ of scire facias was dismissed.

From the above statement of facts, it is apparent that the sole question for this court to determine is, whether or

not the court below erred in overruling the demurrer to the defendant's plea of the statute of limitation.

If the statute of limitations of the territory runs against a proceeding by scire facias to revive a judgment, the demurrer to such plea was properly overruled, and there was no error. If the statute does not run against such action, the plea of course was an improper one, and it was error to overrule the demurrer thereto.

JUDGMENT: re-
vival: limitations.

In determining this matter it is important to observe the difference between a dormant and a barred judgment.

A dormant judgment is one that has become inoperative as to its execution, but a barred judgment is one that is dead and can not be enforced or revived over the objection of the judgment debtor.

At common law the life of a judgment was twenty years, but if an execution was not issued thereon within a year and a day, the judgment became dormant, and an alias execution could not issue thereon, unless revived by scire facias.

The judgment, therefor, although it had been dormant, was not dead, as its life was twenty years. If the first execution was issued within a year and a day, it did not become dormant, on the contrary, executions might issue for its enforcement during its life of twenty years, unless it became dormant for some other reason, such for instance, as death of the parties to it, or assignment, etc., when it again became necessary to revive it by scire facias, that execution might issue for its enforcement notwithstanding its changed condition.

Freeman on Executions, sec. 81, says: "Before any judgment is either satisfied or barred by lapse of time, it may become temporarily inoperative, so far as the right to issue execution is concerned, and so to continue until something is done by which such is revived. In this condition it is usually called a dormant judgment."

The writ of scire facias was adopted at common law as the proper means of restoring vitality to a dormant judgment, before it was satisfied or barred by limitation.

Bingham on Judgments and Executions, 123 and 124, thus defines the writ of scire facias: "It is a writ issued not of a court wherein judgment has been entered or to which a record has been removed, reciting such judgment suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reason, if any there be, why such execution should not issue.

It is clear that at common law the proceeding by scire facias was not a new or distinct action, but simply a writ or process in the original suit for the sole purpose of securing the right to issue execution upon a dormant judgment prior to the expiration of its legal life, and it was not intended nor used for the purpose of reviving a judgment whose life had expired and become barred by a statute of limitation.

In the early case of *Ross v. Duval et al.*, 13 Peters, p. 45, the court was considering a case from Virginia. In that state the law provided that a judgment might be revived upon a motion in the nature of scire facias. The statute of limitation as to judgments was ten years. Duval et al. had recovered a judgment against Ross, and when judgment was about fifteen years old, a motion was made for an execution to issue, and the motion being sustained, on appeal it was urged that the execution was illegally issued, because the statute of limitation of ten years had barred the judgment and all process upon it.

In construing that statute and its effect in that case, the court said: "It is enough to know that the act of 1792 (Virginia) imposes a limitation to actions and executions on judgments by which, like all other limitation laws of the states, a judgment becomes inoperative. An action of debt will not lie upon it, nor can it be revived by scire facias; much less can an execution be issued upon it. Its vitality is gone beyond the reach of a legal renovation."

This case did not arise under the common law, it is true, but under a statute. We refer to it, however, as showing the construction of a statute of limitation, and that its effect is to destroy the vitality of such judgment beyond the power of revival by scire facias or any other process.

Many other cases might be cited to the same effect, but it is unnecessary.

The distinction between a dormant and a barred judgment is very clear, and with this in mind, it is not difficult to understand the apparent conflict of authority found in the briefs of the respective counsel in this case.

The case of *Smith v. Stevens*, N. E. Rep. 594, is cited by plaintiffs in error to sustain their contention, wherein the court held, that "Although the statute of Illinois provided that the lien of a judgment should continue for only seven years, and that the judgment at that time, should become *funtus officio*, so as to affect the lands therein described; that, nevertheless, it might be revived by *scire facias*," etc.

In that case, the Illinois statute provided that the life of a judgment, should be twenty years, but that it ceased to be a lien on real estate in seven years. In other words, it became dormant as to the lien on real estate in seven years but could be revived by *scire facias* as to the lien during the remaining thirteen years of its life. It was a dormant not a barred judgment.

The case of *Murch v. Moore*, 2 Oregon 189, is not in point because the court holds in that case, that a judgment is never barred under the laws of Oregon, and may be executed until payment.

The common law, however, has been modified or set aside by statutory enactment in almost all the states and territories, in regard to judgments and the limitation of actions thereon.

While the right of action in debt, and *scire facias*, on judgments remain, other provisions are changed, and the authorities cited are not necessarily in conflict, when the statutes upon which the decisions were rendered and the circumstances of each case are examined.

The proceeding to revive a dormant judgment in many of the states, is by a simple motion in the original cause, and execution is awarded by an order in the original case.

In such cases it is usually held that the order to revive does not more than reinvest the plaintiff with the right to have

execution on his original judgment. *Marx v. Sanders*, 11 So. Rep. 764.

In that case the action of debt was held barred by the six years' statute of limitation, although the judgment had been once revived within its life.

In other states statutes provide or are construed to mean, the scire facias is an "action" within the meaning of the statute.

In *Greenway v. Dare*, 6 N. J. Law 306, it was contended by counsel that the proceeding by scire facias was not an action or new proceeding but a continuance of the original suit; but the court held that, "Every scire facias is a new and independent action, referring to the former proceedings, but wholly distinct from them."

In *Howard v. Randall*, 5 Atl. Rep. 403, the court says: "Whatever, strictly speaking, may be the nature of scire facias on a judgment, at common law, under our statute it is an action or suit within section 2130 R. L."

The plaintiff in error contends that a scire facias proceeding is not an action within the meaning of the laws of New Mexico, section 1861, Compiled Laws 1897 (Sec. 2, Chap. 53, Laws of 1891); and therefore is not barred by that section; while the defendant in error insists that it is an action within the meaning of that section.

Section 1860, Comp. Laws 1884, is as follows: "The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise especially provided."

Section 1861, prior to amendment by laws of 1891, was as follows "Actions upon any judgment of any court of record of any state or territory of the United States, or federal courts of the United States, within fifteen years."

By these sections of limitation of fifteen years attached to foregoing judgments, and if that section did not also include local judgments, the common law of limitation of twenty years applied to them, until section 1861 was amended by section 2, chapter 53, laws of 1891, to read as follows:

“Sec. 2 (1861). Actions founded upon any judgment of any court of the territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterwards, and actions founded upon any judgment of any court of record of any other territory or state of the United States, or the federal courts may be brought within seven years from and after the rendition of such judgment, and not afterwards; provided, that actions may be brought upon any existing judgments which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterwards; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred.”

This section as amended applies to local judgments as well as foreign and federal, and fixes a positive limitation of right of action thereon at seven years, and specifically says, “And not afterwards.” It is not denied that this limitation would bar an action of debt on a judgment, but it is insisted that the words “Actions founded by any judgments,” is used in a limited sense, and do not include proceedings by scire facias to revive a judgment.

We can not so construe this language, as it was evidently used in its comprehensive sense and was intended to apply to all suits or actions which could properly be brought on a judgment, “Actions founded upon any judgment,” are very comprehensive words, the word actions being in the plural and the language is equivalent to saying, all actions the basis of which is a judgment.

To construe this language as plaintiff in error contends would be to hold that an action of debt on a judgment could not be brought because it was barred by the statute in seven years, nor could any other suit be brought but by scire facias; the barred judgment may be revived and an execution issued upon it.

Such a construction is absurd and could not have been the intention of the legislature enacting the amendment.

The words “Shall be forever barred” in the last line of

the section, referring to stale judgments, emphasize the view that this section was intended to bar forever and render invalid all judgments more than seven years old, unless the proper steps had been taken to revive them.

This section was carefully drawn as is shown by the proviso giving one years' time, in which to revive stale judgments, referred to in the proviso.

In 1887 the legislature enlarged the time for issuing execution on judgments, to five years. Sec. 2, chap. 61, laws of 1887, reads as follows:

"Sec. 2. An execution may issue at any time on behalf of any one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing any action to revive the same."

It will be observed that the word "action" in that section is used in a liberal sense; and refers directly to the proceedings to revive judgments.

The proceedings in this case show all the characteristics of an action at law. The record shows that a precipe was issued for the writ; and the writ of scire facias was issued, which is declared to be the equivalent of a declaration. The writ was returnable as other writs are. The defendant was ordered to show cause; pleas and a demurrer were filed as in other cases; a judgment overruling the demurrer and dismissing the cause was entered; and plaintiffs in error have the scire facias proceeding, not the original action, in this court, seeking a review and reversal, and we see no reason why such proceedings should not be considered an action within the meaning of our statute.

The legislatures of our states have set aside the common law rule and made scire facias a new and independent action, and we are of opinion that the legislature of this territory accomplished the same purpose when the law of 1891 was enacted.

When the legislature declares that "Actions founded upon any judgment, unless brought within seven years, would be

barred," it evidently intended that seven years was a reasonable time in which to revive them, and that after such time, they should be beyond the power of legal renovation by any proceeding whatever; and this we hold to be the meaning and intent of section 1861 of the Compiled Laws of 1897.

"Statutes of limitation are now almost universally regarded favorably as statutes of repose, and liberally construed, and the older decisions to the contrary are disapproved. 13 Am. and Eng. Ency. of Law, p. 692.

"Where the law furnished to a party a simple method of proceeding against an ultimate debtor, and he fails to pursue that, we think such debtor can appeal to the statute of limitation as a protection." *Cleyn v. Dorsheimer*, 23 Fed. Rep. 695.

"And he can not prevent the statute of limitations from running against him, by a circuitous legal proceeding." *Clen v. Priest, Ex'r*, 28 Fed. Rep. 907.

"Neither plaintiff nor defendant will be allowed to thwart the beneficial and healthful effect of the statute of repose by any mere strategy of legal proceeding. 13 Am. and Eng. Ency. of Law, p. 691.

It would be a mere strategy of legal proceeding to hold that a judgment could be revived by a scire facias although other actions thereon were barred, and we therefore hold, that section 1861, Compiled Laws 1897, applies to proceedings by scire facias to revive judgments in this territory.

The judgment in this case was nearly ten years old, at the time this action was brought, and no execution has ever issued upon it, so far as the record shows.

The bar of statute was properly pleaded against it, and the demurrer was properly overruled.

The overruling of the demurrer to the plea of the statute of limitation, and the dismissal of the cause, being the only error assigned, the judgment of the lower court is affirmed with costs.

Mills, C. J., Crumpacker, Leland and Parker, JJ., concur.

[No. 750. August 16, 1898.]

GEORGE K. NEHER, Plaintiff in Error, v. AMBROSIO
ARMIO et al., Defendants in Error.

SYLLABUS BY THE COURT.

EJECTMENT—TENANTS IN COMMON—PLEADING—AMENDMENT—COMMUNITY
PROPERTY—PRESUMPTIONS—ADVERSE POSSESSION—ERROR—AMEND-
MENT OF WRIT.—1. Tenants in common may join in ejectment and
recover their interest demanded so held by them in common.

(a) Under section 1911, Comp. Laws 1884, an order allowing plaintiff to
amend by striking out parties plaintiff before trial and without
objection is not erroneous, no injury appearing to have resulted to
any of the parties.

2. The legal presumption that property acquired by either husband or
wife during the matrimony is community property, may be over-
come by clear and conclusive proof to the contrary.

(a) The act on the part of all the tenants in common in executing a
deed with full warranty of covenants purporting to convey the
the entire estate is ouster of the other cotenants.

3. Where one holds under color of title for statutory period the fact
that the grantors in the deed under which he entered derived their
title from a common ancestor with the plaintiffs will not stop him
from setting up defense of adverse possession as against all demand-
ants not under disability.

(a) The statute of limitations creating title by adverse possession
will not run against one in whose favor a right of action accrued
while under a disability and who commenced his action within
the statutory period after the removal of the disability.

4. Under the code, it is within the power of this court to permit an
amendment of the writ of error by striking out the parties defendant
in error.

Error, from a judgment for plaintiffs, to the Second Judicial
District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

A. B. McMILLEN and CHILDERS & DOBSON for plaintiff in error.

Suits for the recovery of real estate in this territory must be brought within ten years from the time the cause of action accrues, except in case of certain disabilities mentioned in the statute. Comp. Laws, 1884, sec. 1881; Probst v. Board of Missions, 129 U. S. 182; Maxwell Land Grant Co. v. Dawson, 151 Id. 586, and the statute of limitation may be relied on by a defendant in ejectment under a plea of the general issue. Stoder v. Green, 94 Mo. 280; Hogan v. Kurtz, 94 U. S. 773, 775.

A person who obtains a conveyance of land holds adversely to the vendor and may controvert his title. He may disclaim the title under which he entered, and set up any other title or any other defense alike against his vendor and others. Croxall v. Sherred, 5 Wall. 268; Watkins v. Holman, 16 Pet. (U. S.) 25; Robertson v. Pickrell, 109 U. S. 608, 614; Blight v. Rochester, 7 Wheat. 535; Society, etc. v. Paulett, 4 Pet. (U. S.) 506.

The plaintiffs must recover, if at all, upon the strength of their own title. 6 Am. and Eng. Ency. of Law, 226; McNitt v. Turner, 16 Wall. 352-362; Watts v. Lindsey, 7 Wheat. 158; Marsh v. Brooks, 8 How. 223; Fussell v. Craig, 113 U. S. 550; Fussell v. Hughes, Id. 565; Fenn v. Holmes, 21 How. 481; 1 Chit. Pl. 189; Tyler on Eject. 72; Sedg. & Wait, Tr. Tit. Land, sec. 722.

Mere prior possession will not warrant recovery in ejectment against a defendant who claims adversely under color of title. Burt v. Panjaud, 99 U. S. 180; Sabariego v. Maberick, 124 Id. 261; Haws v. Mining Co., 160 Id. 303; Fowler v. Whitman, 2 Id. 270; Drew v. Swift, 46 N. Y. 204; Sedg. & Wait, Tr. Tit. Land, sec. 722.

At common law tenants in common could not join, but must sever in separate devises in an action of ejectment. 1 Chit. Pl. 62; Doe v. Herrington, 3 Nev. & Man. 616.

If plaintiff's ancestor acquired title by deed from the New Mexico Town Co., then the property in dispute was community property, and his widow became the owner of the undivided half thereof upon the death of her husband. Comp. Laws, 1884, secs. 1410, 1411; Ball. on Com. Prop., secs, 161, 162. See, also, Ball. on Com. Prop., sec. 240; Estate of Silvey, 42 Cal. 210; Beard v. Knox, 5 Id. 252; In re Gilmore, 81 Id. 242; Harrison v. Bowman, 29 Id. 347; In re Frey, 52 Id. 660; King v. Legrange, 61 Id. 221; 2 Jar. on Wills, 4, note; McGinnis v. McGinnis, 1 Ga. 496; Havens v. Sackett, 15 N. Y. 365; Leonard v. Steele, 4 Barb. 20.

An equitable title will not warrant a recovery in ejectment. Prentice v. Railway Co., 154 U. S. 163; Johnson v. Christian, 128 Id. 374; Langdon v. Sherwood, 124 Id. 74; Redfield v. Parks, 131 Id. 239; Morehouse v. Phelps, 21 How. 481; Hooper v. Shiner, 23 Id. 335; Sheirburn v. De Cordova, 24 Id. 423; Smith v. McCann, Id. 398; Oaksmith v. Johnston, 92 U. S. 343; Swayze v. Burk, 12 Pet. 11.

NEILL B. FIELD for defendants in error.

It was sufficient to show the deed to Ambrosio Armijo, and his possession under it is abundantly sustained. Sedg. & Wait., Tr. Tit., sec, 291; Isler v. Hailey, 24 S. C. 382; Orton v. Noonan, 19 Wis. 350, 355; Wissehunt v. Jones, 78 N. C. 361; Bank v. Harrison, 39 Mo. 433; Roosevelt v. Hungate, 110 Ill. 595; Miller v. Hardin, 64 Mo. 545; Jackson v. Streeter, 5 Cow. 529; Dowell v. De Lauza, 20 How. 32; Locke v. Whitney, 63 N. H. 597; Jackson v. Brown, 10 Johns, 292; Jackson v. Walker, 7 Cow. 637; Greisle v. McKinnan, 44 Ark. 517; Long v. Wilkinson, 57 Ala. 259; Keith v. Keith, 104 Ill. 397; Hasselman v. Mortgage Co., 97 Ind. 365; Woburn v. Henshaw, 101 Mass. 193; Wilcoxon v. Osborn, 77 Mo. 621; Huntington v. Prichard, 11 S. & M. (Miss.) 327; Kinsman v. Loomis, 11 Ohio, 475; Curlee v. Smith, 91 N. C. 172; Riddle v. Murphy, 7 S. & R. (Pa.) 235; Wilkins v. May, 3 Head. (Tenn.) 173; Bolling v. Teal, 76 Va. 487; McCusker v. McEvery, 9 R. I. 528.

"The possession of lands under an executory contract of purchase is not adverse to the vendor so long as the purchase money is not paid, or, until, by the terms of the agreement, the vendee is entitled to demand conveyance of the legal estate." *Heermaas v. Schmaltz*, 7 Fed. Rep. 566; *Graydon v. Hurd*, 55 Fed. Rep. 724; *Kerns v. Dean*, 77 Cal. 555; *Catlin v. Decker*, 38 Conn. 262; *Eichelberger v. Gitt*, 104 Pa. St. 64; *Turner v. Thomas*, 13 Bush. (Ky.) 518.

Title by election is equally available at law and in equity. *Thellurson v. Woodford*, 13 Vis. Jr. 220; *Watson v. Watson*, 128 Mass. 154; *Smith v. Smith*, 14 Gray, 555; *Hapgood v. Houghton*, 22 Pick. 480; *Wilson v. Townsend*, 2 Ves. Jr. 696; *Devonshire v. Cavendish*, 3 Doug. 47; *Stoddard v. Cutcowpt*, 41 Ia. 331, *Cox v. Rogers*, 27 Pa. St. 167; *Weeks v. Patton*, 18 Me. 42; *Smith v. Guild*, 34 Id. 443; *Morrison v. Bowman*, 29 Cal. 331.

Plaintiff in error is not a stranger to the Armijo title. *Big. on Estoppel*, 280, 281; *Kinsman v. Loomis*, 11 Ohio, 475; *Greenl. Ev.*, sec. 523; *Stacey v. Thrasher*, 6 How. (U. S.) 158.

CRUMPACKER, J.—The facts as to which there is no dispute are, that prior to the fourteenth day of June, 1880, Ambrosio Armijo, was put in possession of the locus in quo, under a contract to purchase same from the New Mexico Town Company, by Harry R. Whiting, as agent of that company and on that day a deed was duly executed by that company to him, which deed was acknowledged and recorded in the manner provided by law. In the spring of 1882, Ambrosio Armijo leased the premises to John Boyle and Mary Boyle his wife, and placed them in possession of the same, and thereafter, on the tenth day of April, 1882, died, leaving a last will and testament which was duly admitted to probate by the probate court of Bernalillo, the county of Ambrosio Armijo's residence. On the first day of May, 1882, Perfecto Armijo, the eldest son of Ambrosio Armijo and Candelaria G. de Armijo, his widow, were duly appointed to execute the will

and qualified as such. The will left certain specified property to the widow, Candelaria G. de Armijo, contained one or two trifling bequests to servants, and devised the great bulk of the estate, including the locus in quo, to the ten children of the testator, share and share alike. The will declares that there were no gains of the marriage community composed of the testator and Candelaria Armijo, in the following language: "I declare and believe that I have no property acquired during marriage; I have only kept my capital intact since I married the second time, but according to Pedro Murilla Velarde and the laws of the country, I leave, direct and order my executors that there shall be delivered to my wife the two paragraphs above, entirely using about one-fifth of my property, which is what the laws of the country authorize." The inventory of the estate was taken on August 14, 1882, and concluded August 17, 1882, and is signed by the executors and by the appraisers appointed by the probate court, in which the locus in quo is appraised as "one lot and house occupied by John Boyle, \$1,500." On August 26, 1882, in pursuance of an order of the probate court the executors made a distribution of the estate and executed and recorded *hijuelas* to the ten children of Ambrosio Armijo, in which to each is set apart one-tenth interest in the locus in quo, in the following language: "One-tenth on one lot and house occupied by John Boyle, \$150." Each of these instruments is signed by Perfecto Armijo and Candelaria G. de Armijo, administrators, and is approved by Tomas C. Gutierrez, judge of the probate court, May 11, 1883, and is recorded in the office of the probate clerk, May 17, 1883. John Boyle continued in possession of the locus in quo, paying rent therefor to the executors until the execution of a deed to A. M. Coddington, on the twenty-eighth day of December, 1883. This rent was divided by the executors, one-tenth to each of the children. Teresa Armijo de Symington, wife of John Symington, was one of the children of Ambrosio Armijo, and on the twenty-seventh day of December, 1883, said Teresa and her said husband, made a power of attorney to Elias H. Armijo

to "sell our right, title and interest individually as guardians of the estate of Dolores Armijo, a minor, in lot No. 17 in block No. 5 as shown on the map of the New Mexico Town Company addition to the town of Albuquerque, situate on the street known as Railroad avenue, and to execute, acknowledge and deliver to the purchaser thereof a warranty deed with full covenants therefor." This power of attorney was duly recorded in Bernalillo county on the twenty-eighth day of December, 1883, Perfecto Armijo and wife, Jesus Armijo and wife, Mariano Armijo and wife, Elias H. Armijo and John Symington and wife, by Elias H. Armijo, as their attorney in fact, conveyed to A. M. Coddington, by warranty deed, with full covenants for title the whole of lot 17 in block 15, which deed was duly recorded in Bernalillo county, and on January 2, 1884, A. M. Coddington and wife conveyed the same property to Conrad Schenfield. Schenfield entered into possession of the entire property and remained in possession thereof, by himself or his tenants until his death, which occurred on the twenty-fifth day of June, 1888. By his last will and testament he devised lot 17 in block 15 to James A. Williamson and the said last will and testament was admitted to probate by the probate court of Bernalillo on the fifth day of July, 1888. Williamson afterwards received deeds from all the heirs at law of Conrad Schenfield and it is admitted that whatever title Schenfield acquired under his deed from Coddington and wife passed to Williamson. The record shows affirmatively that Williamson entered into possession of the premises under the will of Shenfield, deeds from Shenfield's heirs, and claimed by no other title. On December 16, 1890, Williamson conveyed to plaintiff in error, Neher, who continued in possession at the time of the institution of this suit. On August 28, 1896, Ambrosio Armijo, Dolores Armijo de Borradaile and John Borradaile, her husband, and Anita Armijo, an infant, by her mother and guardian, begun this suit in ejectment in the district court of Bernalillo county against George K. Neher for the recovery of the locus in quo. The defendant appeared and answered, interposing the general

issue and also a special plea that the alleged cause of action did not accrue within ten years prior to said suit. Thereupon the plaintiffs joined issue as to the first plea and demurred to the second. Afterwards plaintiffs moved the court to allow them to amend by striking out the names of Dolores de Armijo de Borradaile, and John Borradaile, and that they be allowed to prosecute the suit in the name of the remaining plaintiffs. The motion was allowed, the defendant not objecting thereto. Thereupon the plaintiffs withdrew their demurrer to defendant's second plea and the plaintiffs, Ambrosio Armijo and Anita Armijo, filed their replication, taking issue on the first plea and answering defendant's second plea by alleging infancy at the time the cause of action accrued, and that the action was begun during the infancy of Anita and within three years after Ambrosio Armijo became twenty-one years of age. To the second replication of plaintiffs to the second plea of defendant the defendant interposed his rejoinder, alleging that said alleged cause of action did not first accrue to plaintiffs but to their ancestor, Ambrosio Armijo. Plaintiffs interposed a demurrer to this rejoinder, which was overruled by the court and thereupon plaintiffs filed their sub-rejoinder, and therein denied that said cause of action first accrued to Ambrosio Armijo, the father of the plaintiffs, but on the contrary alleged that Ambrosio Armijo died seized and possessed of an estate in fee simple in said premises. Issue was thereupon joined and thus the pleadings stood at the time of trial, April 3, 1897. After a verdict and judgment in favor of Ambrosio Armijo and Anita Armijo for an undivided two-tenths of the locus in quo and damages, defendant brought the cause into this court by writ of error, and makes the following assignments of error:

1. The court erred in refusing to grant defendant's motion for a verdict at the close of plaintiff's evidence in chief.

2. The court erred in refusing defendant's motion for verdict at the close of the case.

3. The court erred in overruling defendant's motion for new trial in this case.

4. The court erred in overruling defendant's motion in arrest of judgment.

5. The court erred in ruling that the will of Ambrosio Armijo deceased required an election of the widow.

6. The court erred in ruling that said widow did elect to take under said will.

7. The court erred in ruling that said will and the election of said widow divested her of the legal title to the premises in question and vested the same in the heirs of Ambrosio Armijo, deceased.

We will discuss the questions raised by the foregoing assignments of error in their logical order.

First. Defendant insists that these plaintiffs as tenants in common could not be joined as parties plaintiff, and their having so joined is fatal to their case. We

EJECTMENT:
tenants in com-
mon.

do not interpret the law to be as defendant contends, but believe the better rule to be that tenants in common may join in ejectment and recover the whole property demanded so held by them in common, or they may sue separately and recover each one only his whole interest. *Mattis v. Boggs*, 18 Neb. 698; *Kirk v. Bowling*, 20 Neb. 260; *Dawson v. Mills*, 32 Pa. St. 302; *Jackson v. Bradt*, 2 Cal. (N. Y.) 169; *Thayer et al. v. Hollis*, 3 Met. (Mass. 369). But defendant further insists that there was no power in the court to allow the amendment striking out parties plaintiff. This action was instituted as we have seen on the twenty-eighth day of August, 1896, with Dolores Armijo de Borradaile and her husband joined with these

PLEADING:
amendment.

parties plaintiff; the defendant pleaded the general issue on October 27, 1896, and by leave of court on February 26, 1897, plaintiffs amended their declaration by striking out said Dolores Armijo de Borradaile and her husband, as co-plaintiffs, it having been discovered that their claim was barred by the act of limitations. Our statute then in force reads: "Each party by leave of the court shall have leave to amend upon such terms as the court may think proper at any time before verdict,

judgment or decree." As controlled by the principles underlying its operation, this section we think governed the right to amend at the time this action was instituted, and if the defendant was not prejudiced thereby and if it were necessary to determine the real question in controversy we must conclude that the amendment was properly allowed. The contention that the section last above quoted, refers only to amendment of pleadings is not supported by authorities. In the case of *Bealle v. Territory*, 1 N. M. 514, it is said: "Furthermore, as the statutes of this territory provide that each party by leave of the court shall have leave to amend, upon such terms as the court may think proper, at any time before judgment, verdict or decree, and as it does not appear from the record in this cause that the leave granted by the court below to amend the petition injured the lawful rights of the remaining defendants, this court will not review the alleged errors, etc." See, also, *Chapman v. Barney*, 129 U. S. 681; *Watts v. Weston*, 62 Fed. Rep. 136. And the court having the power in its discretion to permit the amendment the exercise of that discretion is not subject to review here. But granting the most that is contended for by defendant, that this amendment created a new cause of action, the action still accrued and was commenced within the time limited by statute after the removal of the disability of infancy of Ambrosio Armijo and within the infancy of his co-plaintiff; and even were this contention well taken, we should be inclined to hold that the defendant having gone to trial on the amended declaration without objection thereto, waived all error in permitting the amendment.

Secondly. It is insisted by learned counsel for the defendant below, that "if plaintiffs' ancestor, Ambrosio Armijo, acquired title by deed from the New Mexico Town Company, then the property in dispute was community property, and the widow became the owner of the undivided half thereof, upon the death of her husband." Presumptively this proposition is true; conclusively it is not. The

COMMUNITY
property: pre-
sumptions.

authorities uniformly lay down the rule that in the absence of proof to the contrary the law presumes a community. It is important to know whether or not the will, taken together with the other evidence, is sufficient to establish the legal title to the extent of an undivided one-tenth interest in the locus in quo in each of the plaintiffs. Says Swayer, Justice, in *Ramsdell v. Fuller*, 28 Cal. 43, "This is only a presumption of law, arising from the fact that a purchase has been made during coverture, and the real character of the transaction may be shown." And in *Ballinger on Community Property*, section 167, it is said: "Certainly it is not required that the proof to destroy this presumption should be any more than sufficient to satisfy the mind of court or jury that its weight is enough to cause a reasonable person under all the circumstances to believe in its sufficiency, in order to counterbalance the presumption that the property was acquired by the funds of the community. The property is merely considered the property of the community until the contrary is shown by legal proof and the legal proof would seem to be a preponderance of the testimony under all the facts and circumstances of the particular case." *Mitchel v. Mitchel*, 80 Tex. 101; 15 S. W. Rep. 708, is to the same effect.

From the record it appears that the testator by his will declared that he had acquired no property during his second marriage which were gains of the community; that the locus in quo was devised to the ten children, share and share alike, to the exclusion of the widow, and that certain other property was devised to the widow, to the exclusion of the children; that the widow and one of the children were appointed executors, that they duly qualified and executed the will and that the widow acquiesced in the distribution of the property as made by the will, and since in this case she is presumed to have known both the law and the facts such acquiescence was with full knowledge of her legal rights. Therefore we must hold that these facts constitute clear and conclusive proof that the locus in quo was not community property; and having reached this conclusion the contention of the defendant that the widow

became vested with the legal title to a one-half interest in the property falls, and the question of the election of the widow under the will became irrelevant in this cause.

Thirdly. Could defendant dispute plaintiffs' title, and if so, have plaintiffs shown such title as will support a recovery? By our statute "it is sufficient to entitle the plaintiff

to recover, to show that defendant was in possession, and that the plaintiff had a right to the possession, thereof." Comp. Laws, 1897, sec.

ADVERSE POSSESSION.

3168. The defendant contends that it was incumbent upon the plaintiffs in order to support a recovery in this cause to establish a perfect title in Ambrosio Armijo, the ancestor of plaintiffs, and that failing in this they have not shown a right to possession as against defendant. It is certainly true that the uniform rule as laid down by the authorities is that the plaintiff must recover on the strength of his own title rather than on the weakness of his adversary's, and a complete analysis of the character of the possession of the contending parties is necessary to determine the controlling question in this cause. The plaintiff contends, and the learned court below held, that as plaintiffs derived their title under the will of Ambrosio Armijo and defendant held under chain of title from the deed of the five adult heirs of Ambrosio Armijo, whose title sprang from the same source, the plaintiffs were not bound to trace their title beyond what is alleged to be the common source and that no other or different title being offered or relied upon by Neher, the defendant is estopped from repudiating the title of his grantors. But in opposition, the defendant argues that the act of these plaintiffs in connecting the defendant's record title with the deed from the adult heirs of Ambrosio Armijo, the ancestor, can not operate as an estoppel against him to prevent his contesting the title of Ambrosio Armijo, the ancestor; that defendant and his privies having held by adverse possession under color of title, for more than ten years have paramount title, and that therefore the question of the disability of plaintiffs to maintain this action or the effect of the saving clause in section 1881, Compiled Laws of 1884,

has no place in the discussion of this case, since the right of the latter depends upon the title in their ancestor. If it be true, as contended by defendant, that there ever had been any possession of this lot which was adverse to Ambrosio Armijo, the ancestor, during his lifetime, such possession would have been sufficient to set the statute in motion, and the statute having begun during the life of Ambrosio Armijo would continue to run against these plaintiffs after his death. The facts in the record, however, do not sustain this position. Boyle and wife, as tenants of Ambrosio Armijo, and of his children after his death attorned to him during his lifetime and to his executors up to the time of the execution of the deed by the heirs to Coddington, and under the theory of the case that Boyle and wife were in possession under an executory contract, to purchase, the rule of law applicable to the case would be the same. "The possession of lands under an executory contract of purchase is not adverse to the vendor, so long as the purchase money is not paid, or until, by the terms of the agreement, the vendee is entitled to demand conveyance of the legal estate." *Heermass, v. Schmaltz*, 7 Fed. Rep. 566; *Graydon v. Hurd*, 55 Fed. Rep. 724; *Kerns v. Kean*, 77 Cal. 555; *Catlin v. Decker*, 38 Conn. 262; *Eichelberger v. Gitt*, 104 Pa. St. 64; *Turner v. Thomas*, 13 Bush (Ky.), 518.

Therefore, we can not agree with the learned counsel for defendant that the cause of action in this case first accrued to Ambrosio Armijo, the father of the plaintiffs, during his lifetime. And, since we have decided that the widow never acquired any right of possession to the locus in quo, certainly it can not be pretended that from the date of the deed from the New Mexico Town Company to Ambrosio Armijo up to the date of the deed to Coddington the right to the possession was not in Ambrosio Armijo during his lifetime and thereafter in these plaintiffs to the extent of their interest. Therefore, having established the right of possession to the locus in quo to have been in Ambrosio Armijo during his lifetime and in these two plaintiffs until the making of the deed with full warranty of covenants to Coddington, the question arises whether or

not the defendant upon the record in this case has shown a better right or title as against plaintiffs. What title has the defendant shown? The plaintiff introduced in evidence a record title tracing the conveyance of the locus in quo from Ambrosio Armijo, ancestor, down to the defendant George Neher. But defendant insists that he does not claim through or under any of said deeds. He disclaims the title under which he entered and sets up a defense of title by adverse possession. We take it that the question for determination is not so much whether defendant is estopped to deny the title as alleged to have been derived from common ancestor with plaintiffs, as whether the facts in this case constitute adverse possession within the meaning of the statute as against the plaintiffs' delivery of the deed to Coddington, what was the relative position of the parties. The law seems to be well settled that by proof of actual ouster one co-tenant may sustain an action in ejectment against another, and that a conveyance by the owner of a share of the whole estate and delivery of possession of the whole is an ouster. Sedg. & Waite on Trial of Land Title, pp. 41, 69, 199, 476, 739, 482; Demblitz on Land Titles, sec. 183. Has such proof of ouster of plaintiffs been shown? We think it has, and that the deed to Coddington established clear, open, notorious, adverse possession in the grantee. We think the supreme court of the United States in the case of Robertson v. Pickerel, 109 U. S. 615, laid down the true rule: "Where both parties assert title in a common grantor and no other source, neither can deny that such grantor had a valid title when he executed his conveyance." That court did not decide that where title was asserted from any other source, such estoppel would operate; nor do we find any authorities which do so hold. Our view of the law is not at variance. The defendant in this case under his deed with full warranty of covenants might well have assumed that his grantors were so seized, and here it is immaterial whether they were or not. Their act gave to defendant and his privies a possession under color of title adverse to these plaintiffs, and the defendant is not bound to depend

his title on that of Ambrosio Armijo, the ancestor. The distinction between color of title and title must be presented. *Sete v. Waite*, sec. 764. He holds in opposition to Ambrosio Armijo and to these plaintiffs. He holds by virtue of the limitation in the statute. The statute is his source of title, so that he did not come into possession wrongfully. He came into possession under color of title, and by operation of the statute he has title by adverse possession against all claimants excepting those under disability in whose favor the law has preserved a right of action. That eminent jurist, Chief Justice Marshall in the case of *Blight's Lessee v. Rochester*, 7 Wheaton 543, in considering the principle that one is bound to admit the title when traced to a common ancestor said, "But if the deed of the defendant does not refer to their ancestor * * * the defendant holds in opposition to John Dunlop (the ancestor) or claims to have acquired that title. If he holds under adverse title his right to contest that of Dunlop is admitted," and "The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other in the quiet enjoyment of the premises. No principle of morality restrains him from doing this nor is either the letter or the spirit of the contract violated by it. The same court in the case of *Willison v. Watkins*, 3 Pet. 45, held in discussing the question of estoppel between landlord and tenant, that, "the extent of the doctrine was never intended to go so far as to apply to a case where the tenant disclaims the tenure, claims the fee adversely in right of a third person or his own, or attorns to another. His possession becomes tortious by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period limited, but he must lay his demise subsequent to the

termination of the tenancy, for before that he had no right of entry. By bringing his ejectment he also affirms the tenancy and goes for the forfeiture. The relation between tenants in common is in principle very similar as that between lessor and lessee; the possession of one is the possession of the other, while the tenure is acknowledged. But if one ousts the other or denies the tenure, and receives the rents and profits to his exclusive use, his possession becomes adverse and the statute of limitation begins to run." This doctrine is affirmed by the case of *Barnetz, Lessee, v. Casey*, 7 Cranch, 464, in which Mr. Justice Storey said: "As however a tenant in common can not in general maintain an action of ejectment against his cotenant, and there are no facts found in this case to prove an actual ouster and to take it out of the general rule the consequence is that the judgment in the opinion of the majority of the court must be affirmed." In the case of *Probst v. Trustees, etc.*, 128 U. S. 182, the supreme court discussed the question of what constituted adverse possession under the statute involved in this case. Mr. Justice Miller, in delivering the opinion of the court, quotes from *Ewing v. Burnet*, 11 Pet. 41, 52. "An entry by one man on land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done. If made under claim and color of right, it is an ouster; otherwise it is a mere trespass in legal language. The intention guides the entry and fixes its character." It is the essence of the statute of limitation that whether the party had a right to the possession or not, if he entered under the claim of such right and remained in the possession for the period of ten years or other period prescribed by the statute, the right of the plaintiff who had the better right is barred by that of adverse possession." If there be any case which could clearly illustrate the sound policy of acts of repose and quieting title and possession by the limitations of actions, it is in this. Here was actual ouster of plaintiffs by their cotenants, by deed promptly recorded, and actual, open, notorious adverse possession in defendant and privies from that day to this.

After careful reviewing of the authorities we can not assent to the doctrine contended for by plaintiffs, that this defendant is estopped from denying their title because derived through a common ancestor. The title of the plaintiffs to the locus in quo depends entirely upon the will of Ambrosio Armijo, while, as against them, whatever rights the defendant acquired depends upon the statute of limitations. And the legal effect of the deed from the heirs to Coddington having been to disseize the plaintiffs, and set the statute in motion as against them, we must now determine whether Neher acquired such an interest in the locus in quo as would defeat the plaintiffs' right to recover. By successive conveyances that title which Coddington acquired and to which the defendant must trace his title for a lawful entry, this possession has been continued without interruption adversely to these plaintiffs down to the present time. As against any cotenants of the grantors who were not under disabilities we see no reason why after ten years of such adverse possession this title might not by operation of the statute have matured into a perfect title. But what were the facts at the time of the conveyance to Coddington? These plaintiffs were both under the disability of infancy, and under our statute had three years after arriving at full age within which to bring their action. Ambrosio Armijo, in his right, and Anita Armijo, by her guardian commenced this action within the time so limited.

In view of what is here decided, can defendant maintain title by adverse possession as against these plaintiffs? Suppose that plaintiffs had joined with their cotenants in the deed to Coddington, and that Coddington had held down to the present time. Would there be any dispute as to their power to repudiate their own act, and could Coddington hold as against such disaffirmance? We think not. Much less then is it true that this defendant by the adoption of a tortious act committed upon these plaintiffs during their infancy could have the benefit of the bar of statute of limitations as against them at any time within the three years after the removal of their disability, and it appears from the record that the plain-

tiffs commenced their action within the time prescribed by law.

In this court the defendant in error interposes a motion to dismiss the writ of error, alleging a misjoinder of parties defendant in error, and plaintiff in error, has moved to amend, by striking out the names of Dolores Armijo de Borradaile and John Borradaile, her husband. We are of the opinion that our right to permit the amendment exists under section 2685, sub-section 94, Compiled Laws 1897.

ERROR: assignment of writ.

For the foregoing reasons, we are of the opinion that under the evidence presented by the record in this cause, there was no error committed by the trial court prejudicial to the right of plaintiff in error, and the judgment of the district court of Bernalillo county is affirmed.

Mills, C. J., Parker, McFie and Leland, JJ., concur.

[No. 803. August 23, 1898.]

TERRITORY OF NEW MEXICO, Appellee, v. THOMAS ARCHIBEQUE and ALBERTO CEBADO, Appellants.

SYLLABUS BY THE COURT.

CRIMINAL LAW—APPEAL—TRANSCRIPT—DUTY OF CLERK.—On appeal in a criminal case, where the appeal operates as a stay of proceedings, either by virtue of the statute as in murder cases or by order of the district court, it is the duty of the clerk of that court to send up the transcript whether appellant pay his fees therefor or not.

Application of appellants for rule on clerk of Second Judicial District Court, Bernalillo County, to send up transcript of record. Granted and made absolute.

HORTON MOORE for appellants.

F. W. CLANCY for clerk.

PARKER, J.—This cause is before the court on an application of appellants for a rule on the clerk of the Second judicial district court to send to this court a transcript of the record in the district court in and for Bernalillo county. It appears from the application that the appellants were convicted in the district court for the crime of arson and sentenced to imprisonment in the territorial penitentiary for the period of five years each; that appellants each were granted an appeal from said judgment to this court; that the district court upon granting said appeal also further ordered as follows, “and it is further ordered that said appeal operate as a stay of proceedings in this cause.”

The clerk of the district court appears by counsel and represents that he has failed to send up the transcript for the reason that appellants have failed to pay his legal fees for the same, and the parties consent that this application may be decided as though the rule on the clerk had been granted and his response had been filed showing the above reason for his failure to send up the transcript.

The question presented is whether in a criminal case appealed to this court, and in which the district court granting the appeal also makes a specific order that the appeal shall operate as a stay of proceedings in the cause, the clerk of the district court is required to send up a transcript of the record

below without receiving his legal fees therefor from appellants. By section 3413 of the Compiled Laws of 1897, it is provided that “Where

an appeal shall be taken which operates as a stay of proceedings, it shall be the duty of the clerk of the district court to make out a transcript of the record in the cause, and certify and return the same to the office of the clerk of the supreme court without delay.” By section 3414 it is provided that “When the appeal does not operate as a stay of proceedings, such transcript shall be made out, ratified (certified) and returned on the application of the appellants.” The distinction

APPEAL: transcript: duty of clerk.

made in these two sections of the statutes as to the duty of the clerk is apparent and it is clear that when an appeal in a criminal case operates as a stay of proceedings, as by section 3420 of the Compiled Laws of 1897 it is made to operate in all cases of murder, it is made the duty of the clerk of the district court to send up the transcript whether the appellant pays for the same or not. And it has been so held by this court. *Territory v. Hicks*, 6 N. M. 596; *Aguilar v. Territory*, 8 N. M. 495.

It is provided however in section 3407 of the Compiled Laws of 1897 which applies to crimes other than murder, that "No such appeal shall stay execution of such judgment unless the district court shall be of the opinion that there is probable cause for such appeal or so much doubt as to render it expedient to take the judgment of the supreme court thereof, and shall make an order expressly directing that such appeal shall operate as a stay of proceedings."

In this case the order was made by the district court under the foregoing section directing that the appeal should have the effect of a stay of the proceedings. It is contended by counsel for the clerk that the appeal not being in itself a stay of proceedings, as appeals in murder cases are made to be by section 3420 of the Compiled Laws, therefore this is not a case within the contemplation of section 3413 of the Compiled Laws; but we agree to this contention. It is certainly immaterial whether the appeal derived its power to stay proceedings from the statute as in murder cases or from an order of the district court, as in this case.

It is, therefore, the duty of the clerk of the district court to send up the transcript whether the appellants pay his fees for the same or not. The rule as prayed for will be granted and made absolute.

Mills, C. J., and McFie, J., concur; Leland, J., did not sit in this cause.

[No. 716. August 23, 1898.]

HENRY LOCKHART, Plaintiff in Error, v. J. Q. WILLS
et al., Defendants in Error.

SYLLABUS BY THE COURT.

MINING LANDS—SPANISH GRANT—LOCATION OF MINE—FORFEITURE—
EJECTMENT—HARMLESS ERROR.—1. Lands embraced within the
boundaries of a Mexican or Spanish grant in New Mexico in 1893, as
claimed and which was *sub judice* in the court of private land
claims, were open to exploration and purchase under the mining laws
of the United States.

2. (a) As against a subsequent locator, a location, not perfected accord-
ing to the territorial laws, within the time provided becomes
forfeited and void, and the ground embraced therein becomes
open to location.
(b) Plaintiff, to maintain ejectment against a subsequent locator,
must show a valid location.
(c) When the facts produced by plaintiff show a forfeiture of his
location has taken place, it is the duty of the court to instruct the
jury to find for the defendants.
3. Where facts show that a forfeiture of plaintiff's location has taken
place, for failure to perform the statutory requirements for a valid
location, it is immaterial to show that such failure was a result of a
conspiracy to defraud plaintiff on the part of plaintiff's co-locator
with other persons who locate after forfeiture.
4. (a) The assigning of a wrong reason for an act by the trial court is
not reversible error if the act done was in law right.
(b) When the plaintiff's case is inherently and fatally defective and
is incurable, the defendant is entitled to have the judgment
affirmed, notwithstanding error of the trial court.
5. (a) When plaintiff allows his location to become forfeited by failure
to perfect same, as required by law, he can not set up as an ex-
cuse for failure that prior to the expiration of the time allowed
by law to perfect his location, others took adverse possession of
his claim, of which he was not aware until after forfeiture.
(b) In order for adverse possession and ouster to furnish an excuse
for not perfecting the location of a mining claim, the party offer-
ing such excuse must have in some way been prevented thereby
from perfecting his location. *Lockhart v. Wills et al.*, 50 Pac.
318, overruled.

Error, from a judgment for defendant, to the Second Judicial District Court, Bernalillo County. Affirmed, overruling Lockhart v. Wills et al., page 263, ante.

The facts are stated in the opinion of the court.

WARREN, FERGUSON & GILLET for plaintiff in error.

The prior discovery and possession by Pilkey of the "Sampson Mine" was sufficient possession and title on the part of plaintiff to sustain ejectment against defendants as intruders, having no better title. Comp. Laws 1884, secs. 1570, 2218, 2258, 2263; Deemer v. Falkenburg, 4 N. M. 149; New Mexico, etc., v. Crouch, Id. 293; Anderson v. Gray, 25 N. E. Rep. 843; Christy v. Scott, 14 How. 282; Coryell v. Cain, 16 Cal. 567; Sears v. Taylor, Id. 318; Wilson v. Fine, 38 Fed. Rep. 792; Gonder v. Miller, 27 Pac. Rep. 333.

The possession of one tenant in common is the possession of all, and the law assumes and requires that each shall be true to the other. Day v. Howard, 73 N. C. 1; Campbell v. Campbell, 13 N. H. 483; Kinney v. Slattery, 51 Ia. 353; Miller v. Myers, 46 Cal. 535; Mining Co. v. Taylor, 100 U. S. 37.

Putting of Fagly in possession and denial by Pilkey of plaintiff's rights, before expiration of the three months after the first location, constituted an actual ouster of plaintiff. Sedg. & Wait, Tr. Tit. 163, sec. 277; Barnitz v. Casey, 7 Cranch. 456. See, also, Sabanigo v. Maverick, 124 U. S. 261; Haws v. Mining Co., 160 Id. 303; Burt v. Panjaud, 100 Id. 180; English v. Johnson, 12 Morr. M. Rep. 202. See, also, Bird v. Gisbros, 70 Am. Dec. 617; Plume v. Seward, 60 Id. 601; Weimer v. Lowry, 11 Cal. 104; Bequette v. Canefield, 4 Id. 278.

Continuous possessio pedis does not apply to mines as to agricultural lands. Atwood v. Fricott, 17 Cal. 37; English v. Johnson, Id. 107; Blanch. & Wks. on Mines, 172, 107; Morton v. Solambo, 26 Cal. 527.

CHILDERS & DOBSON for defendants in error.

An appellate court will not reverse a case and remand it for errors committed on a former trial, if it is certain a new trial must result in the same verdict as was rendered on the former trial. *Wisner v. Brown*, 122 U. S. 214, 220; *Evans v. Pike*, 118 Id. 250; *Barth v. Clise*, 12 Wall. 403.

The ground in controversy was open to location at the time the location notices under which the respective parties claim were posted. 1 Supp. Rev. Stat. U. S. [2 Ed.] 923, sec. 15; *Stoddard v. Chambers*, 2 How. 285, 318; *Wolsey v. Chapman*, 101 U. S. 755, 769; *Newhall v. Sanger*, 92 Id. 761; *Van Ravnegan v. Bolton*, 95 U. S. 33; *Hosmer v. Wallace*, 97 Id. 575; *Trenouth v. San Francisco*, 100 Id. 251; *Aurecochea v. Bangs*, 114 Id. 381; *Doolan v. Carr*, 125 Id. 618; U. S. v. *McLaughlin*, 127 Id. 428; *Carr v. Quigley*, 149 Id. 652.

Until the grant is confirmed, the grant owner has no right whatever; he can not maintain ejectment or any other kind of suit against occupants. *Pinkerton v. Ledoux*, 129 U. S. 346; *Botiller v. Dominguez*, 130 Id. 238; *Astiazaran v. Land & Min. Co.*, 148 Id. 80.

Plaintiff in error not having recorded his location notice within the time required by law forfeited all rights acquired under his location. *Belk v. Meagher*, 104 U. S. 287; Comp. Law, sec. 1566; acts 1889, chap. 25, secs. 1, 2; *Faxon v. Barnard*, 4 Fed. Rep. 703; *Mallett v. Uncle Sam Min. Co.*, 1 Nev. 188; *Kendall v. Mining Co.*, 144 U. S. 663; *Wills v. Blaine*, 6 N. M. 238; *Seidler v. La Fave*, Id. 44; *Mining Co. v. Patterson*, 3 Id. 269.

PARKER, J.—This is an action of ejectment brought by the plaintiff in error against the defendants in error, in the district court of the Second judicial district, sitting in and for Bernalillo county, for the recovery of the possession of a piece or parcel of mining ground called by the plaintiff in error the Sampson Mining Claim, situated in the Cochiti mining district in said county.

At the close of the trial the court instructed the jury to find a verdict in favor of the defendant and entered judgment accordingly. To review the action of the court below, plaintiff prosecutes this writ of error.

It was stipulated by the parties that the premises in controversy are situated within the limits of the Canada de Cochiti grant, as claimed and as surveyed and approved by the surveyor general of New Mexico on June 29, 1885; that the grant was never confirmed by congress on said report; that petitions were filed for the confirmation of the grant in the court of private land claims by one set of claimants on March 2, 1893, and by another set of claimants on March 3, 1893; that said grant was confirmed by decree of said court September 29, 1894; that the premises in controversy are not included within the boundaries of the grant as confirmed by said decree; and that appeal from said decree was taken to the supreme court of the United States and was pending and undetermined at time of the trial.

It is claimed by counsel for plaintiff that the premises in controversy being located within the boundaries of a claimed Mexican or Spanish grant, and which was at the time sub judice in the court of private land claims of the United States, the same was withdrawn or reserved from the public domain and were not "lands belonging to the United States," open to exploration for mining purposes, within the meaning of section 2319 of the Revised Statutes of the United States. It is further claimed that as a consequence of the foregoing proposition, the rights of the parties in this case are not to be determined by the ordinary rules governing the right to the possession of mining claims upon lands belonging to the United States, as established by the federal and territorial legislation, but they must be ascertained by the rules of law applicable to contests for the possession of land where neither party has title or right to title, and where each must depend upon the priority, extent and continuity of actual possession.

The first of the foregoing contentions is controverted by counsel for defendants, and it is insisted that the premises in

controversy although within the boundaries of the Canada de Cochiti grant, as claimed, are "lands belonging to the United States" within the meaning of section 2319 of the Revised Statutes of the United States, and subject to appropriation under the mining laws. It is important, therefore, to ascertain the status of these lands at the time of the entry of the parties thereon.

The lands in controversy are within the territory ceded to the United States by Mexico by the treaty of Guadalupe Hidalgo in 1848. Article 8, of that treaty (9 Stat. 922)

MINING lands:
Spanish grant.

provides that Mexicans established in the ceded territory, shall be free to remain or to remove at any time, retaining the property they possess in the ceded territory or disposing of the same and removing the proceeds thereof and further, that property of every kind belonging to Mexicans not established in the ceded territory shall be inviolably respected, the same as if the property belonged to citizens of the United States. This section of this treaty came directly under the consideration of the supreme court of the United States, in the case of *Botiller v. Dominguez*, 130 U. S. 238. The case arose on the question as to whether a grant, perfect at the time of the treaty of Guadalupe Hidalgo, needed to be presented to the board of commissioners of California under the act of March 3, 1851, under penalty of forfeiture. The court say: "By the treaty of peace known as that of Guadalupe Hidalgo, of Feb. 2, 1848, 9 Stat. 922, which closed the controversy and the war between the United States and Mexico, a cession was made of a very large territory by the government of Mexico to the government of the United States. This was a transfer of the political dominion and of the proprietary interest in this land, but the government of Mexico caused to be inserted in the instrument certain provisions intended for the protection of private property owned by Mexicans within this territory at the time the treaty was made; and it may be conceded that the obligation of the United States to give such protection, both by this treaty and by the law of nations was

perfect. * * * ” “Two propositions under this statute” (The act of March 3, 1851, requiring claimants of Mexicans or Spanish grants in the state of California to present the same to the board of commissioners within a certain time under penalty of forfeiture) “are presented by counsel in support of the decision of the supreme court of California. The first of these is, that the statute itself is invalid, as being in conflict with the provisions of the treaty with Mexico, and violating the protection which was guaranteed by it to the property of Mexican citizens, owned by them at the date of the treaty; also in conflict with the rights of property under the constitution and laws of the United States, so far as it may affect titles perfected under Mexico. * * * With regard to the first of these propositions, it may be said that so far as the act of congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon the other the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as sovereign power, chooses to disregard.” We understand this case to mean that the treaty of Guadalupe Hidalgo established the duty upon the government of the United States to protect Mexican citizens in all of their rights of property which they possessed at the date of the treaty, but that we must look to the legislation of congress alone to ascertain what has been done in this regard, and that the treaty itself placed no restrictions whatever upon the disposition of any of these lands which the courts are bound to recognize. The same principle is recognized in *Pinkerton v. LeDoux*, 129 U. S. 346, and *Aztiazaran v. Santa Rita Land & Mining Co.*, 148 U. S. 80. The lands included in the grant in question as

claimed, and as surveyed by the surveyor general of New Mexico, were reserved from sale or other disposal by section 8 of the act creating the offices of surveyor general of New Mexico, Kansas and Nebraska, passed July 22, 1854 (10 Stat. 308). The section provides that the surveyor general should ascertain the origin, nature, character and extent of all claims of land under the laws, usages and customs of Spain, and make report thereon, which was to be laid before congress for such action thereon as might be deemed just and proper, with a view to confirm bona fide grants and give full effect to the treaty of 1848 (Guadalupe Hidalgo). And the section further provides: "And until the final action of congress upon such claims, all lands covered shall be reserved from sale or other disposal by the government." Under this statute, the surveyor general of New Mexico caused the land in question to be surveyed and on June 29, 1885, approved the survey. But congress never acted on the report nor confirmed the grant.

By the act of March 3, 1891 (First Supplement, Rev. Stat. U. S., p. 917), congress provided an entirely new method of ascertaining the rights of claimants to Spanish or Mexican land grants. It creates the court of private land claims, mentioned above in the stipulation of the parties, and confers upon it the jurisdiction to hear and determine the rights of claimants on petition, in all cases where the claims have not been confirmed by congress or otherwise fully decided upon by lawful authority. The act further provides that the decree of the court of private land claims shall be final as to the rights of claimants, unless appeal be taken to the supreme court of the United States, in which case the decree of the latter court becomes a final adjudication of the rights of both claimant and the United States. It will, therefore, be seen that congress elected to abandon its control over the adjudication and settlement of these land titles and to delegate the same to a new tribunal clothed with full and complete powers in the premises. No reservation of the land within any claimed grant is contained in the act, but, on the other hand, section 15 of the act expressly repeals section 8 of the act of July 22,

1854, as follows: "That section eight of the act of congress approved July twenty-second, eighteen hundred and fifty-four, entitled 'An act to establish the offices of surveyor general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes,' and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed." Section 14 of the act provides that the proceedings before the court of private land claims, if it shall appear that the land, or any part thereof, decreed to any claimant, under the provisions of the act, shall have been sold or granted by the United States to any other person, such title from the United States shall remain valid and such court shall render judgment in favor of such grant claimant for the reasonable value of said lands so sold or granted.

It will thus be seen from these acts of congress that it has first established a reservation of the lands embraced within the boundaries of a claimed grant upon the report of the surveyor general, and that thereafter it has elected to repeal the reservation and the section of the act authorizing it, and to provide for compensating any grant claimant for any lands which the government may have elected to sell and dispose of within the boundaries of his grant. It seems clear to us, therefore, that there is no statutory reservation of any of the lands embraced within the boundaries of a claimed grant in New Mexico.

But it is urged by plaintiff that these lands have been held by the land department of the United States to be reserved, and that such construction is binding upon this court. We refer to a decision of Secretary Francis reported in 24 Decisions of the Interior Department, p. 1, in which he holds that by the terms of treaties between the United States and Mexico lands embraced within Mexican or Spanish grants, were placed in a state of reservation, and by the act of March 3, 1891, the reservation is continued in force. We are also referred to certain decisions of the commissioner of the general land office, contained in letters of instruction to the

surveyor general of New Mexico. In each of these decisions the secretary and the commissioner have sought to determine as a matter of law the status of lands embraced within a claimed Mexican grant. While it is true that a finding of fact made by an officer of the land department of the government, in a matter with which that department is charged by law, is binding upon the court, it has frequently been held that where the land department of the government attempts to construe a law, their construction is not binding upon the courts. *Wisconsin Central R. R. Co. v. Forsythe*, 159 U. S. 46.

It is further to be remarked that the right to the possession of a mining claim is never a matter for the determination of the land department of the government. The location and possession of a mining claim is determined by the federal and local legislation, and not until the locator seeks to obtain a patent for his mining claim does he come in contact with the land department. And even then, if his right to the possession of the claim be contested, the whole matter is referred by the land department to the court for determination. We do not agree to the construction put upon the treaty of Guadalupe Hidalgo, by the land department of the government, nor do we think that construction is borne out by the supreme court of the United States, in the cases cited above. Neither any actual reservation of these lands by the land department nor any statutory authority for making such reservation has been called to our attention, and we assume that none exist.

There being no reservation of these lands within claimed grants in New Mexico by treaty, law or authorized act of the executive department of the government (*Wolsey v. Chapman*, 101 U. S. 755), we conclude that they are not reserved lands and are "lands belonging to the United States" within the meaning of section 2319 of the Revised Statutes of the United States.

These conclusions are borne out by a case which arose under the legislation of congress to settle the French and Spanish claims in the territory of Louisiana. On February 15, 1811, congress passed an act authorizing the president to

offer for sale all lands which had been surveyed in the territory, but made the following reservation: "Provided, however, that till after the decision of congress thereon, no tract shall be offered for sale, the claim to which has been in due time and according to law" (under former acts of congress for ascertaining and adjusting titles and claims to lands within the territory of Orleans and the district of Louisiana and also in Missouri) "presented to the recorder of and titles in the district of Louisiana and filed in his office for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana." This reservation was continued in force up to May 26, 1829, when it ceased until it was revised by the act of July 9, 1832. A New Madrid location has been made by the defendant, while this reservation was in force, upon a tract claimed and filed under the act of 1811 and supplementary acts thereto. In passing upon the effect of the reservation and the attempted entry under the New Madrid certificate, the court said: "His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. Had entry been made or the patent issued, after the twenty-sixth of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested." *Stoddard et al. v. Chamber*, 2 Howard, 285-318.

Numerous cases arise in California concerning the status of lands embraced within claimed grants in that state, but it will be seen that they were all determined upon the acts of congress peculiar to California and different from the present state of congressional legislation. By the act of March 3, 1851 (9 Stat. 631), congress provided a commission to ascertain and settle the private land claims in the state of California. Section 13 of the act provides "That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the district or supreme court, and all claims, the claims to which shall not have been presented to said com-

missioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States." The act of July 1, 1862 (12 Stat. 489), granted to certain railroad companies certain alternate sections of land on each side of their road, "not sold, reserved or otherwise disposed by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." This grant afterwards enlarged (13 Stat. 358), and continued the reservation from the grant by providing the grant "shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler." The grant to the railroad company took effect January 31, 1865, and the patent issued in 1870. Under the act of 1851, a claim for the Moquelamos Mexican or Spanish grant was duly filed with the commissioners and was finally rejected by the supreme court of the United States on February 13, 1865. The land embraced therein thus became a part of the public land of the United States. The public land system was extended to California by the act of March 3, 1853 (10 Stat. 246), and after the rejection of the Moquelamos grant, entry was made of a portion of the land formerly claimed thereunder, and patent issued subsequent to the patent to the railroad company. The grantee of the railroad company brought suit against the grantee of the past patentee to determine the ownership of a quarter section of land covered by both patents, and the supreme court of the United States, in *Newhall v. Sanger*, 92 U. S. 761, held that by reason of the statutory reservation contained in the acts mentioned above, the railroad company did not take the land in controversy under its patent of 1870, and that the entry-man, under the general laws after the reservation of the act of 1851 ceased, took the land under his subsequent patent. Reference is made in the opinion to the fact that the Mexican grant was sub judice at the time the grant to the railroad company took effect, but we do not understand the court to put its decision on this ground, but upon

the express statutory reservation. Numerous other cases arising in California have been decided by the same court upon the same principle or in which the same principle was recognized. (See *Van Reynegan v. Bolton*, 95 U. S. 33; *Hosmer v. Wallace*, 97 U. S. 575; *Teenouth v. San Francisco*, 100 U. S. 251; *Aurrecoechea v. Bangs*, 114 U. S. 381; *Doolan v. Carr*, 125 U. S. 618; *U. S. v. McLaughlin*, 127 U. S. 428; *Carr v. Quigley*, 149 U. S. 652.) Some of the principles involved in the case under consideration have been discussed and a like conclusion reached by this court in *Grant v. Jaramillo*, 6 N. M. 313, and *Chavez v. Chavez de Sanchez*, 7 N. M. 58. .

(2) Under the foregoing conclusion, this case must be determined upon the principles applicable to the ordinary contests for the possession of mining claims upon the public domain. The pertinent provisions of the laws of New Mexico, in force at the time of the entry upon the lands in controversy by the parties are as follows: Section 2286 of the Compiled Laws of 1897, is as follows:

LOCATION of
mine: ejectment.

“Sec. 2286. Any person or persons desiring to locate a mining claim upon a vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposit, must distinctly make the location on the ground so that its boundaries may be readily traced, and post in some conspicuous place on such location a notice in writing stating thereon the name or names of the locator or locators, his or their intention to locate the mining claim, giving a description thereof by reference to some natural object or permanent monument as will identify the claims; and also within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted. And, provided, no other record of such notice shall be necessary.”

Sections 1 and 2 of chapter 25 of the Laws of 1889 are as follows:

“Section 1. That the locator or locators of any mining claim, located after this act shall take effect, within ninety days from the date of taking possession of the same, sink a discovery shaft upon such claim to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or shall drive a tunnel, adit or open cut upon such claim to at least ten feet below the surface, exposing mineral in place.”

“Section 2. The surface boundaries of all mining claims hereafter located, shall be marked by four substantial posts or four substantial monuments of stone set at each corner of such claim. Such posts or monuments of stone shall each be plainly marked so as to indicate the direction of such claim from each monument of stone or post.”

It will be seen that the laws require that the locator of a mine post his location notice, mark his surface boundaries with four substantial posts or monuments, properly marked, and within ninety days after taking possession, sink a shaft upon such claim at least ten feet deep from the lowest part of the rim at the surface, exposing mineral in place or drive a tunnel, adit or open cut at least ten feet below the surface, exposing mineral in place, and also within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county, in which the notice is posted. The testimony offered in behalf of the plaintiff shows that he and his co-locators posted a location notice on the ground in controversy on July 10, 1893, calling it the Sampson mining claim, and that the same was not filed for record until December 9, 1893. The record discloses an entire absence of proof of a compliance with any of the other essential elements of a valid location save a discovery of mineral. Plaintiff introduced an amended location notice of the locators under which defendants claim, dated December 16, 1893, which was duly

recorded December 30, 1893. and which recites that it is an amended location of the Washington mining claim, the original whereof was made October 23, 1893. No evidence was offered to show that the locators of the Washington mine exercised dominion over the premises as locators prior to October 23, 1893, and in fact proof was offered, but which was excluded on other grounds, which tended to show affirmatively that they did not appropriate the ground prior to that time. This suit was instituted on June 21, 1895, and nothing was done or attempted to be done to perfect the Sampson location between July 10, 1893, the date of location, and June 21, 1895, the date of commencing action, except as above recited. There is no evidence in the record to show that the entry of defendants was otherwise than peaceably. Under this state of facts, and other facts to be hereafter discussed, the court directed a verdict for the defendant, and we think he committed no error. It is not to be questioned in this or any other court that a compliance with the federal and territorial statutes is necessary to perfect and preserve one's rights to the possession of a mining claim. "The right to possession comes only from a valid location; consequently if there is not location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made from taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the act of congress and the local laws and regulations." *Belk v. Meagher*, 104 U. S. 284.

And a compliance with the local laws in regard to the acts required by them to be done to make a valid location was necessary on the part of the plaintiff and his co-locators under penalty of forfeiture. *Faxon v. Barnard*, 4 Fed. Rep. 702; *Mallett v. The Uncle Sam Mining Co.*, 1 Nev. 188.

When the time expired within which those acts of location were to be performed under the statute, the land embraced within plaintiffs location became open and subject to location and appropriation by any qualified person. Plaintiff's rights had become forfeited and extinguished at least as against a

subsequent locator coming in before the defects in plaintiff's location had been cured. It was necessary for the plaintiff before he could maintain ejectment to show a valid location. *Wills v. Blaine*, 5 N. M. 238.

The facts showing that a forfeiture had taken place at the time of the location of the Washington mine, it was the duty of the court to take the case from the jury. *Fairbanks v. Woodhouse et al.*, 6 Cal. 434.

(3) The plaintiff offered evidence tending to show that the plaintiff and one Johnson entered into a contract with one Pilkey, such as is commonly called a grub-stake contract, and thereunder Pilkey located the premises as the Sampson Mine, in the names of the three parties; that before the expiration of the ninety days after location within which the same might be perfected, Pilkey entered into a conspiracy with some of the defendants to locate the ground and to defraud plaintiff and Johnson of their rights; that in pursuance of such conspiracy the locators of the Washington mine visited the premises before the expiration of the ninety days, took samples therefrom for assay, and looked the ground over and remained in the vicinity until the claim became forfeited and afterwards located it; that Pilkey had an equitable interest in the new location. Some of this evidence was admitted, and some excluded, but we think it should have been excluded as immaterial. When the Sampson location became forfeited the land claimed thereunder became public domain and open to location. It was the same as if it never had been made as against a subsequent locator. No matter how firmly Pilkey was bound in law or in morals to perfect the location of the Sampson, the fact remains that he did not do so, and the claim consequently became forfeited. *Saunders et al. v. Mackey*, 6 Pac. Rep. 361. And the fact of his conspiracy with others, if true, is entirely immaterial. *Doherty v. Morris*, 16 Pac. Rep. 911. We do not wish to be understood as denying the proposition that if the relation of Pilkey to the plaintiff was such as to make him plaintiff's trustee in the Washington

FORFEITURE.

location, he might be charged as such in a proper proceeding for that purpose as to any interest, if any, he might have therein. *Saunders et al. v. Mackey*, 6 Pac. Rep. 361; *Hunt v. Patchin*, 35 Fed. Rep. 816. But this is an action of ejectment based upon the Sampson location which had become forfeited.

(4) It appears from the transcript that this case was tried in the court below upon a theory that the lands in controversy were not open to location as lands of the United States, being a part of the Cochiti grant as claimed. The court evidently was led into this error by the contention of counsel for plaintiff, and by the implied or actual admission of counsel for defendants. The case was tried upon the question of prior possession in the plaintiff and whether he had lost his actual possession by abandonment at the time of the entry by the locators of the Washington. This led to the introduction of a vast amount of testimony concerning actual possession and acts and intentions of plaintiff as to abandonment of the claim, all of which we have seen was entirely immaterial under the views above expressed. At the close of the testimony the court took the case from the jury. It may be that, as the case stood at the close of the trial, under the theory upon which it was tried, there were questions of fact which should have been submitted to the jury. But the plaintiff in his proof went into all the questions involving the validity or invalidity of his location of the Sampson mine. He showed every element of a mining location which he could show, and not only failed to show a valid location, but showed affirmatively that his location was forfeited and void at the time of the location of the Washington mine. It is therefore clear that to remand this case for a new trial, would be an empty ceremony. The result of a new trial could not but bring the same result. The assigning of a wrong reason for an act by the court below is not error if the act done was in law right. *Wisner v. Brown*, 122 U. S. 214. Where the plaintiff's case is inherently and fatally defective and is incurable, the defendant is entitled to

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have the judgment affirmed notwithstanding errors of the trial court. *Barth v. Clise*, 12 Wall. 400; *Evans v. Pike*, 118 U. S. 241. We decide, therefore, that the court in directing a verdict for the defendant committed no error.

(5) This case was decided by this court at the last term and the cause remanded for a new trial, 50 Pac. Rep. 318. Motion for rehearing was made and allowed. Two points are made in the motion. The second is that the court in its former opinion failed to pass upon the proposition as to the status of lands within claimed grants in New Mexico. As this underlies all questions raised, we have been compelled to examine the whole case.

We can not agree with the conclusion reached by this court on the former hearing of this case. It can not be questioned that it was the duty of plaintiff to see that all requirements as to location were complied with under penalty of forfeiture. He testifies that the first he learned of any adverse claim by defendants was after the expiration of ninety days and that he never visited the claim until long afterwards. Plaintiff failed to show or offer to show that he was prevented in any way from perfecting his location by reason of any unlawful entry and ouster by defendants prior to the expiration of the ninety days, and he showed the location under which defendants testified to have been made after the ninety days expired. Upon this state of facts this court upon a former hearing held that it was immaterial for the plaintiff to be permitted to show any act of dominion or adverse possession by defendants prior to the expiration of the ninety days as an excuse for his failure to perfect his location. But we can not agree to this conclusion. These acts of defendants, if any were done, must have in some way prevented the plaintiff from perfecting his location. It can not be said that a locator may calmly wait until his location becomes forfeited and then offer as an excuse the fact that he afterwards learns that others were holding adversely to him, during the time he might have perfected his claim. If he was prevented from perfecting his claim by a

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forfeiture.

wrongful intrusion and by threats of violence if he should attempt to resume possession, this would furnish a complete excuse. *Erhardt v. Boaro*, 133 U. S. 527-534. But no such proof was offered. If this were an action of trespass for damages to the premises while plaintiff had the right to them, such proof might be material. But we can not see how it can be in view of the facts in this case. Another portion of the opinion deals with the question of abandonment and the proof competent thereunder, but in our view of the case this discussion is not pertinent. We can not follow the conclusion reached at the former hearing by this court and the same is overruled.

This disposes of all the assignments of error. We find no reversible error in the record and the judgment of the lower court will be affirmed. And it is so ordered.

Mills, C. J., Crumpacker and McFie, JJ., concur; Leland, J., did not sit in this case.

[No. 748. August 23, 1898.]

SOUTHERN CALIFORNIA FRUIT EXCHANGE, Plaintiff in Error, v. MARTIN P. STAMM, Defendant in Error.

SYLLABUS BY THE COURT.

APPEAL — REVIEW — EXCEPTIONS — ATTACHMENT — JUDGMENT IN REM — PLEADINGS — HARMLESS ERROR.—1. This court will not review alleged errors, where exceptions were not taken out at the time and preserved.

2. An attachment is auxiliary where a personal judgment is sought, but it is an original attachment where a judgment *in rem* only is sought.

(a) The court has jurisdiction to render a judgment *in rem*, where a levy of defendant's property has been made under a valid writ of attachment, and service by publication had as required by law, notwithstanding the return of the officer was not made until after judgment was taken.

3. A plea tendering no issue, is frivolous and may be stricken from the files on motion, and it is not error to ignore it.

(a) Where the record, on appeal, does not show that a plea in abatement was not urged for hearing before the trial, it will be presumed to have been abandoned.

4. To render judgment for an amount in excess of plaintiff's claim is harmless error where the judgment is *in rem* only and the proceeds of the property levied upon and sold are insufficient to pay the amount actually due.

(a) A remitter of the excess in such a case is unnecessary.

Error, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo county. Affirmed.

The facts are stated in the opinion of the court.

WARREN & FERGUSON and R. W. D. BRYAN for plaintiff in error.

Proceedings by attachment are to be strictly construed, as statutory and in derogation of the common law. *Staab v. Hersch*, 3 N. M. 209.

A judgment by default can not be had until the jurisdiction of the subject-matter and the person of the defendant appears from the record. *Jamison v. Weaver*, 84 Ia. 611; *Holtzman v. Martinez*, 2 N. H. 286; *Cabeen v. Douglas*, 1 Mo. 336.

The trial of the attachment issue should precede the main issue. Comp. Laws. 1884, secs. 1944, 1959, 1960; *Bennett v. Zabriski*, 2 N. M.; *Staab v. Hersch*, *supra*; *Price v. Bescher*, 12 Heisk. (Tenn.) 372.

Until the sheriff's return is made in such case, and filed in court, and thus made a part of the record, the court is without jurisdiction, and any proceeding taken by it *coram non judice* and void. *Shinn on Att.*, secs. 223, 445 et seq.; *Drake on Att.*, sec. 87, et seq. See, also, *Cooper v. Reynolds*, 10 Wall. 308; *Morris v. School Trustees*, 15 Ill. 266; *Roof v. Singmaster*, 62 Ia. 511; *Holtzman v. Martinez*, 2 N. M. 286; *Craig v. Williams*, 44a S. R. 934.

A. B. McMILLEN for defendant in error.

So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial to the ruling of the law by the judge and to the admission or rejection of evidence. *Zeller's Lessee v. Eckert*, 4 How. 289, 298; *Barrow v. Reab*, 9 How. 366; *Lathrop v. Judson*, 19 Id. 66; *Ins. Co. v. Mordicai*, 22 Id. 111; *De Solre v. Nickleson*, 3 Wall. 420; *Clements v. Nickleson*, 6 Id. 299; *Tome v. Dubois*, Id. 548; *The Georgia v. United States*, 7 Id. 32; *Laber v. Cooper*, 7 Wall., Id. 565; *Alviso v. United States*, 8 Id. 337; *The Eagle v. Frazer*, Id. 152; *U. S. Exp. Co. v. Kountz*, Id. 342; *Bank v. Kentucky*, 9 Id. 353; *Rogers v. Ritter*, 12 Id. 317; *Klein v. Russell*, 19 Id. 433; *Wood v. Lackawana, etc.*, 93 U. S. 619; *Wheeler v. Sedgwick*, 94 Id. 1; *Wilson v. McNamee*, 102 Id. 572; *Springer v. United States*, Id. 586; *Wood v. Weimer*, 104 Id. 786; *Davis v. Fredericks*, 105 Id. 4; *Morrill v. Jones*, 106 U. S. 466; *Railway Co. v. Meyers*, 115 Id. 1.

The jurisdiction of the court depends upon the fact of legal service; and if there had been legal service in the cases cited by plaintiff in error, the officer would have been allowed, upon application, to amend his return to conform to the facts to support the default. *Ald. on Judg., Wr. and Pro.*, sec. 192; *Railroad Co. v. Ashby's Trustee*, 9 S. E. Rep. (Va.) 1003; *Scruggs v. Scruggs*, 46 Mo. 271; *Johnson v. Day*, 17 Pick. 108; *Morris v. School Trustees*, 15 Ill. 266.

In the case at bar the sheriff's return was sufficient. *Shinn on Att.*, sec. 322; *Hardin v. Lee*, 51 Mo. 241; *Shacklets & Clydes Appeal*, 14 Pa. St. 326; *People v. Cameron*, 7 Ill. 468; *Ex parte Foster*, 2 Story (U. S. C.) 131; *Rodgers v. Bonner*, 55 Barb. 9. See, also, *Ritter v. Scannell*, 11 Cal. 238; *Mitchell v. Lipe*, 8 Yerg. (Tenn.) 179; *Wheaton v. Sexton*, 4 Wheat. 503; *Reed v. Perkins*, 14 Ala. 231; *Ritter v. Sinclair*, 12 Rich. 617.

McFIE, J.—On the seventeenth day of April, 1896, Martin P. Stamm, through his counsel Alonzo B. McMullen, filed in the office of the clerk of the district court of Bernalillo county a declaration in a suit to recover the sum of three hundred (\$300) dollars damages on account of the failure on the part of the Southern California Fruit Exchange, defendant in the court below, to deliver to him a car load of oranges alleged to have been purchased by him. At the same time the declaration was filed, an affidavit in attachment and attachment bond were also filed in the office of the clerk of the district court for Bernalillo county, the affidavit in attachment alleging that the defendant, the Southern California Fruit Exchange, was a corporation organized under the laws of California, and that its principal place of business was not within the territory of New Mexico, and that it had no designated agent within said territory upon whom process might be served in suits against it.

On the day the declaration, affidavit and bond were filed in said court, a writ of attachment and summons were issued by the clerk of the court. On the twentieth day of April, 1896, a petition was filed in said court by the plaintiff for the purpose of securing the sale of a car load of oranges, which was alleged to be perishable property. The object of the petition is as follows: "The plaintiff represents to the court that by virtue of a writ of attachment issued out of this court in the above cause, the sheriff of Bernalillo county, has duly levied the said writ of attachment by seizing a car load of oranges as the property of the defendant in the city of Albuquerque; that the said property attached as aforesaid is of perishable nature and liable to be lost unless the same is sold within a few days; and that it is to the interest of all parties to have the sale made at the earliest day possible. The plaintiff therefore prays the court for an order directing the said sheriff to sell the said property attached at an early day, and directing the manner of such sale." This petition was sworn to. On the same day the court made the following order:

"Upon reading the petition of the plaintiff, and hearing the evidence in regard thereto, the court finds that the property attached is a car load of oranges; that the said oranges are of a perishable nature, and that it is to the interest of all parties to have the same sold forthwith. It is therefore ordered that the said sheriff of Bernalillo county, sell the property attached in bulk, as aforesaid, at public auction to the highest and best bidder, first giving three days notice in a daily newspaper printed and published in the city of Albuquerque, county of Bernalillo, aforesaid." Signed, N. C. Collier, Judge.

On the tenth day of October, 1896, proof of publication for service as required by law in the case of attachments upon the ground of nonresidence, was filed.

On the twenty-third day of October, 1896, on motion of plaintiff's counsel, and during a regular term of said court, the defendant corporation was adjudicated to be in default; and on the tenth day of December, 1896, and during said regular term, testimony was heard on behalf of the plaintiff, and judgment was rendered against the defendant corporation, for the sum of three hundred and thirty-seven (\$337.25) dollars and twenty-five cents and costs. The attachment was sustained by the court, and the sheriff was directed to turn over to the plaintiff, the proceeds arising from the sale of the attached property, less the costs.

The defendant did not at any time, either in person or by counsel, enter a general appearance in the cause until the judgment had been duly entered, the attachment sustained, and the proceeds of the sale of the attached property ordered paid to the plaintiff by the sheriff; but on the fifth day of October, R. W. D. Bryan entered a special appearance for the defendant, and moved to dismiss the cause for reason that there had been no service of summons upon the defendant corporation. This motion was afterwards withdrawn, and on the twentieth day of October, 1896, R. W. D. Bryan again appears specially for the purpose of filing a plea which is as follows: "And the said defendant by its attorney R. W. D. Bryan, enters special appearance, and for the purpose of thi-

plea, and comes and defends, etc., and says that before and at the time of the commencement of said action, it, the Southern California Fruit Exchange, was, and from thence hitherto has been, and still is a corporation organized and existing under the laws of the state of California; and that it, the said Southern California Fruit Exchange, was not found or served with process in the said county of Bernalillo, or in the said territory of New Mexico, and this it is ready to verify."

On the fifteenth day of January, 1897, the defendants appeared specially by counsel, and filed motion to set aside the judgment entered in the cause on the ground of want of jurisdiction in the court to enter judgment, which said motion was overruled by the court, on the twentieth day of January, 1897.

On the twenty-first day of January, 1897, the sheriff of Bernalillo county made his return showing the sale of the property attached under the order of the court, and showing the disbursement of the proceeds thereof; also publication of notice of said sale.

On the twenty-first day of January, 1897, the sheriff filed his return showing the levy of the writ of attachment, and seizure of the car load of oranges above referred to, on the seventeenth day of April, 1896, the said return of the sheriff being dated April 23, 1896.

On the sixth day of August, 1897, writ of error was sued out of the supreme court in this case.

From the above statement of facts as shown by the record, it will be observed that there was no general appearance of the defendant corporation during the entire progress of this cause in the court below. No exceptions were taken

to the default proceedings, nor to the judgment entered by the court at the time such judgment was taken, nor were any exceptions saved in the bill of exceptions, and this court will not consider errors alleged to have been committed in the trial of the cause, not excepted to in the trial court at the time the ruling was made. *Laird v. Upton*, 8 N. M. 409; *Territory v.*

APPEAL: review:
exceptions.

Perea, 1 N. M. 627; Speigelberg v. Mink, 1 N. M. 308; Co. Com'rs Sierra Co. v. Co. Com'rs Dona Ana Co., 5 N. M. 190; Territory v. Hicks, 6 N. M. 596; Territory v. O'Donnell, 4 N. M. 196; Territory v. Baker, 6 N. M. 238.

There is but one question, therefore, raised by this record for the consideration of this court, and that is the jurisdiction of the court to render the judgment in damages. It was stated in the argument by counsel for plaintiff in error, that they did not question the power of the court to dispose of the property seized under the writ of attachment, nor of the proceeds thereof; but their contention was that the court had no jurisdiction to render judgment as to the amount of damages. This being a question that may be properly raised at any time during the progress of the cause, even in this court, we have examined this record with a view of determining the merits of this contention.

ATTACHMENT:
judgment in rem.

This cause was brought under section 1927 Comp. Laws of 1884, which reads as follows: "A creditor wishing to sue his debtor in attachment may place in the clerk's office of the district court of any county in this territory, a petition or other lawful statement of his cause of action, and shall also file an affidavit and bond, and thereupon such creditor may sue out an original attachment against the lands, tenements, goods, moneys, effects and credits of the debtor, in whosoever hands they may be." The petition, affidavit and bond were undoubtedly filed under this provision of the statute, which fully authorizes the proceeding as an original attachment. The fact that a declaration was filed does not rob the proceedings of its efficacy as an action of attachment. Where the action of attachment is brought against a resident defendant, and where personal service is or may be had, it is not only an action in rem, but it is also an action in personam. But an action of attachment brought on account of the non-residence of the defendant, and property is levied upon and seized under the writ of attachment and notice by publication alone is had, it is purely an action in rem, and affects the property

rather than the person. The judgment of the court can not be a personal judgment against defendant so that an execution may be issued upon it for the recovery of any balance that may be due the plaintiff upon a judgment rendered in such cause, remaining after the property seized has been disposed of and the proceeds applied upon such judgment. The statute of this territory specially says that "when the defendant shall be notified by publication as aforesaid, and shall not appear and answer the action, judgment by default may be rendered which may be proceeded on to final judgment as in ordinary actions; but such judgment shall only bind the property attached, and shall be no evidence of indebtedness against the defendant in any subsequent suit." Sec. 1940, Comp. Laws of 1884. The record in this case shows that service by publication was had upon the defendant, and that a car load of oranges were levied upon in the city of Albuquerque as property of the defendant, and this seems to be in full compliance with the requirements of the laws of this territory. The court had full jurisdiction to enter a judgment in rem, for the amount found due the plaintiff, order the sale of the property attached, and apply the proceeds upon the judgment thus entered. An examination of the record shows that there was no personal judgment entered in this case; no execution was awarded, but the property was ordered to be sold as perishable, and the proceeds to be applied on the judgment less the costs of the proceeding and this was the proper judgment to enter in this proceeding.

The plaintiff in error contended that this is an ancillary attachment under sections 1959 and 1960, Compiled Laws of 1884, and points out the distinction between a suit in attachment and a suit where the attachment is ancillary to the main suit. It is insisted that in this case the attachment was ancillary to the main suit, and that the main suit was the declaration upon the indebtedness, and refer to the provision that in such case, should an attachment issue be dismissed, the cause shall not be dismissed. We think this contention is erroneous. This was not an ancillary attachment. An ancillary attach-

ment is a proceeding in aid of the personal action, when the debtor has been served or has appeared in court so as to be liable to a personal judgment. The remedy thus employed is usually an adjunct to the main suit. Waples on Attachments, page 4.

It often happens that after a suit at law has been instituted for the recovery of a debt or damages, and where personal service is or may be had; a ground of attachment arises, such for instance, as an attempt of the defendant to fraudulently dispose of his property, or remove it, so as to defeat a recovery of the debt sued on; that an attachment becomes necessary that the property may be seized and held to respond to any judgment that may be recovered. The attachment proceeding in such case is designated ancillary. In a case of this kind the original suit controls. The case at bar, however, is entirely different, is brought under a different section of the statute, and is an original attachment. The allegation of the affidavit that the defendant was a nonresident, shows that there was no expectation of securing personal service, nor obtaining a personal judgment; but to subject the property of the defendant within the jurisdiction of the court to sale under attachment and order of the court. The judgment in this case, which was taken by default, without the opposition of the plaintiffs in error in the court below, bears out this view, being a judgment in rem only.

In the case of *Staab v. Hersch*, 3 N. M. 209, this court said that, "As the law now stands in this territory, attachment proceedings are auxiliary to actions at law, but each characterized by separate pleadings, and a distinct practice." Attachment proceedings are auxiliary in a case where personal service is had and a personal judgment sought, as the assumpsit issue is the main suit. The case of *Staab v. Hersch* was a case of this kind, and the language of the court was correct as applied to that case. But where an attachment is sued out on the ground of the nonresidence of the defendant, and a judgment in rem alone is sought, there is but one suit and that the attachment. The mere fact that a declaration

was filed and summons issued in such case, is immaterial. The statute requires a petition to be filed in attachment cases (and a declaration is the same thing); but where the attachment is brought on the ground of nonresidence, the contention of plaintiff in error that there are two distinct suits, is not well taken.

Plaintiffs in error also urge as error that the court below gave judgment for damages before disposing of the attachment issue. Default having been taken, and a jury being waived, the court entered judgment for the damages and found the issue on the attachment in favor of the plaintiff in one judgment. The fact that the amount of damages were stated first in the judgment is immaterial, as the entire judgment is one transaction, and there was no error in rendering the judgment that way.

The plaintiffs in error seem to rely on the fact that the sheriff's return of the levy and seizure of the car load of oranges was not filed in the court at the time the judgment was taken, and that, for this reason the court below had no jurisdiction to render the judgment. The record shows that the return of the sheriff was not filed until some time after the judgment was rendered. This, however, is not sufficient to rob the court of jurisdiction. The jurisdiction of the court does not rest upon the filing of the return of the officer, but it becomes complete when the officer has made a valid levy and seizure under a lawful writ of attachment. The record in this case shows that, while the return of the officer showing the levy of the writ, and seizure, was not filed in the court until the twenty-first day of January, 1897, the return of the officer showing levy and seizure is dated April 23, 1896, and shows that the property was actually levied upon on the seventeenth day of April, the day the suit was brought. The legality of the writ of attachment is not questioned. The return shows that the levy and seizure were made under this writ prior to the rendition of judgment, and the court has jurisdiction to render the judgment regardless of the return of the officer. Of course, the return of the officer should have

been made prior to the rendition of the judgment, for the reason that the return of the officer is the best method of establishing the facts therein stated; but it is not the return of the officer that gives the court jurisdiction. It is the levy and seizure. A levy and seizure sufficient to give the court jurisdiction of the subject-matter was made on the seventeenth day of April, 1898, and the sheriff, by withholding his return, or neglecting to file his return showing that fact, could not deprive the court of its jurisdiction. *Ritter v. Sannell*, 11 Cal. 238; *Mitchell v. Lipe*, 8 Yerger (Tenn.) 179; *Wheaton v. Sexton*, 4 Wheat. (U. S.) 503.

“In attachment causes, the jurisdiction over any given subject is obtained by a levy thereon of a writ properly issued.

And it is a rule of universal application that when a court once acquires jurisdiction, subsequent error or irregularity will not divert it, no matter what or how great errors or irregularities may subsequently occur. The res remains in the grasp of the court. *Shinn on Attachment*, sec. 322; *Waples on Attachment*, p. 312; *Hardin v. Lee*, 51 Mo. 241; *People v. Cameron*, 7 Ill. 468; *Rogers v. Bonner*, 55 Barb. 9; *Rowen v. Lamb*, 4 Greene (Iowa) 468; *Cooper v. Reynolds*, 10 Wall. 308.

The property seized in this case was perishable and section 1853, Compiled Laws of 1884, provides for the sale of such property under an order of the court. The record shows that on the twentieth day of April, 1896, the plaintiff in the court below filed a sworn petition asking for the sale of this property as perishable, and in the petition set up the fact that the property had been levied upon and seized by the sheriff; and the court, in its order directing the sale of the property, distinctly finds that the levy had been made upon the property attached. Thus the fact of the seizure of the property in dispute was brought to the attention of the court as early as the twentieth day of April, 1896, and the court was made aware of its jurisdiction of the subject-matter at that time, based its order upon the fact, and under the authority cited above, properly retained jurisdiction to the end. The record

further discloses that service by publication was had upon the defendant, notice given it, not only that suit was pending, but that the property of defendant had been levied upon and would be sold to satisfy the debt as required by statute. The fact that the return showing the levy and seizure of the goods was not made until after the judgment was taken is but an irregularity not affecting the jurisdiction of the court, and it was not reversible error for the court to render judgment prior to the filing thereof.

The plaintiff in error also contends that there was a plea in abatement filed by defendant prior to the taking of default, and that it was error to allow default or judgment until plea in abatement was disposed of. It is true that a paper purporting to be a plea in abatement was filed under a special appearance, and was disposed of at the time
PLEADING. the default was taken. The court evidently did not regard the paper filed as a plea in abatement, nor any other proper plea in the case. By reference to the paper designated a plea in abatement, and which has been set out in substance above, it will be seen that it is not a plea in abatement, nor does it raise any issue whatever. It does not traverse the affidavit of attachment, but simply alleges that the Southern California Fruit Exchange was incorporated under the laws of the state of California, and was not found or served with process in said action in said county of Bernalillo, and territory of New Mexico. This corroborated the allegation in the affidavit of attachment as to the nonresidence of the defendant, and establishes the right of attachment. The further allegation that the defendant was not served with process in the county of Bernalillo, and not found there, is wholly immaterial in this proceeding, where there was no attempt to obtain a personal judgment against defendant. Therefore this plea was frivolous, and was disregarded by the court below as such. We are of the opinion that the court committed no error in this, as the plea presented no issue for the consideration of the court, and was of no value whatever as a

pleading. It might have been stricken from the files upon motion, but there was no error in disregarding it.

“Where the record on appeal in a criminal cause does not show that a hearing was urged on a plea in abatement, it will be presumed that the plea was abandoned.” *Territory v. Barrett*, 42 Pac. Rep. 66; 8 N. M. 70.

The court below had complete jurisdiction to render the judgment rendered, and inasmuch as no personal judgment was entered against the defendant such as would be binding upon him in any other proceeding, or attach to any other property except the car load of oranges attached, there was no error in the action of the court below in granting final judgment, and in overruling the motion of the plaintiffs in error to set aside the judgment.

It appears from the record that the judgment below was for a larger sum than was sued for by the plaintiff. This was a harmless, and not reversible error under the circumstances of this case.

In the case of *Western Union Telegraph Co. v. Lonwill*, 5 N. M. 309, it was held by this court that the plaintiff should be required to remit the excess, and the judgment affirmed for the proper amount. In this case, the error

HARMLESS error. can not injuriously affect the plaintiff in error or his property. If a personal judgment had been rendered, the court would require the plaintiff to remit the damages recovered in excess of the plaintiff's demand, but it is unnecessary in this case to take such action. The record discloses the fact that the sheriff, under the order of the court, in this case, sold the property attached for the sum of five hundred and twenty (\$520) dollars. The sheriff in his return of the disbursement of this fund shows that the disbursement was as follows: Paid freight \$272.14; printing notice of sale, \$3; sheriff's fees, \$24.50; paid Stamm (the attaching creditor), \$220.36.

It therefore appears that the total proceeds of the sale of the property had been disposed of by the sheriff, and after the payment of expenses and costs of suit, there remained the sum

of two hundred and twenty (\$220.36) dollars and thirty-six cents to be paid to the attaching creditor. Therefore, under the law, there being no personal judgment rendered, there can be no further recovery against the plaintiff in error under this judgment. It is useless in this case to remand the cause so as to require the plaintiff to remit the damages stated in the judgment in excess of the claim of the plaintiff. The plaintiff in error can not suffer in any way. The judgment is of no binding force upon it for the payment of any further sum or sums of money, nor can execution issue for the seizure of his property.

Therefore the judgment of the court below is affirmed.

Mills, C. J., Crumpacker, Parker and Leland, JJ., concur.

[No. 776. August 23, 1898.]

ROMULO GARCIA, Plaintiff in Error, v. JESUS CANDELARIA, Defendant in Error.

SYLLABUS BY THE COURT.

SET-OFF—ABANDONMENT OF PLEA—PARENT AND CHILD—CLAIM FOR SUPPORT.—1. A defendant who has pleaded set-off, in moving the court to instruct the jury for himself at the conclusion of the plaintiff's case, abandons his plea and is not put to its proof.

2. When a person is living in *loco parentis* with another, both are estopped from claiming for wages or services performed on the one hand, or for board and necessities furnished on the other, unless an express contract for compensation is proved.

Error, from a judgment for defendant, to the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

WARREN, FERGUSON & GILLET for plaintiff in error.

Under the pleadings and the evidence plaintiff should have recovered. 2 Suth. Dam. 440; 5 Am. and Eng. Ency. Law, 35; Spahn v. Willman, 39 Atl. Rep. 787, 790; Smith v. Packard, 27 S. E. Rep. 586; Baca v. Barrier, 2 N. M. 131; 1 Suth. Dam. 265; 2 Par. Con. 523.

The plea of set-off being an affirmative plea, the defendant should, after plaintiff had made his proofs, have been put to the proof of his set-off. Wat. on Set-off, 92, sec. 79; Magenau v. Bell, 14 N. W. Rep. 664; 2 Greenl. Ev., sec. 516; Fullerton v. Bank, 1 Pet. 723, 731. See, also, Little v. Slemph, 27 S. E. Rep. 808; Eddings v. Bonner, 38 S. W. Rep. 1110; Simpson v. Edens, Id. 475; Undh. Ev., 111, 114, sec. 79; Miller v. Wood, 44 Vt. 378; Scarboro v. Scarboro, 29 S. E. Rep. 352; Levy v. Gillis, 39 Atl. Rep. 785.

The relationship between plaintiff and defendant, under the circumstances and facts proved and surrounding this cause, was no bar to plaintiff's recovery. Succession of Stewart, 21 So. Rep. 29; Mayfaiite's Appeal, 2 Atl. Rep. 28; 17 Am. and Eng. Ency. Law, 336; Thompson v. Halstead, 29 S. E. Rep. 991; Adams v. Adams, 23 Ind. 50.

WILLIAM D. LEE and TOMAS C. MONTOYA for defendant in error.

The court was clearly correct in directing a verdict. Loret v. Price, Wright (Ohio) 89; Sprague v. Waldo, 38 Vt. 139; Oxford v. McFarland, 3 Ind. 156; Bowney v. Haydock, 40 N. J. Eq. 513; Vansaudt v. Cramer, 60 Ia. 434; Sawyer v. Hebard, 58 Vt. 375; Coe v. Wagler, 42 Mich. 49; Hall v. Finch, 29 Wis. 278; Butler v. Slam, 50 Pa. St. 456; Murdock v. Murdock, 7 Cal. 511; Lantz v. Frey, 14 Pa. St. 201; Sharp v. Cropsy, 11 Barb. 224; King v. Kelly, 28 Ind. 89; Conble v. Rymon, 26 Id. 207; Leidig v. Coover, 47 Pa. St. 534; Dye v. Kerr, 15 Barb. 444; Defiand v. Austin, 9 Penn. 310; Fich v. Peckham, 16 Vt. 150; Duffy v. Duffy, 44 Pa. St. 399; Davidson v. Davidson, 2 Beas. 246; Kaye

v. Crawford, 22 Wis. 320; Putnam v. Town, 34 Vt. 429; Bowen v. Bowen, 2 Bradf. (N. Y.) 336; Griffin v. Porter, 14 Wend. 209; Givinston v. Ackerton, 5 Conn. 530; Insurance Co. v. Bloodgood, 4 Wend. 652; Thompson v. Halstead, 29 S. W. Rep. 974; Mountain v. Fisher, 22 Wis. 93; Pittle v. Dawson, 4 Dell. 100; Fisher v. Fisher, 5 Wis. 472; Updike v. Tetus, 2 Beas. N. J. 151; Linn v. Linn, 29 Pa. St.

MILLS, C. J.—This is an action in assumpsit originally brought in Bernalillo county in the year 1896 and to this court on a writ of error.

The facts, as disclosed by the record, are that in the year 1888 the plaintiff married the daughter of the defendant and lived for some years thereafter with his wife at the house of his father-in-law in Old Albuquerque, and that thereafter they resided sometimes at the house of the defendant, some eighteen miles from Albuquerque, and sometimes at his house in Albuquerque. When they lived at the house in the country, a part of the time the defendant was with them. After the marriage the plaintiff worked for the defendant and did what he was told to do. A short time before the beginning of this suit, just how long is not stated, plaintiff and his wife separated and then this action was begun, the plaintiff claiming on a quantum meruit for work and labor done, etc. A bill of particulars was filed by the plaintiff, claiming for seven years and four months services at thirty dollars per month, making \$2,610 less by cash received \$222, balance claimed to be due, \$2,388. The defendant pleaded non-assumpsit and set-off and filed a bill of particulars claiming over \$3,000 for board, clothing, necessities, etc., furnished the plaintiff and his wife by him at the request of the plaintiff from December 1, 1888, to September 3, 1896. Issue was joined and on April 12, 1898, the case was tried before a jury.

But very little evidence was taken. Only two witnesses were called and the evidence of one was wholly immaterial and the plaintiff in error was the only witness examined who gave any evidence which was permitted. At the conclusion

of his testimony, which is brief, the plaintiff rested his case and on motion the court instructed the jury to find a verdict for the defendant, which was done. The usual motion for a new trial was filed and overruled and, as above stated, the case was brought to this court on a writ of error.

Six grounds of error are assigned which we will briefly take up and discuss.

The second error assigned is that "the court erred in not putting defendant to his proof of offset, pleaded by the defendant." This assignment is not tenable. In moving the court to instruct the jury to find a verdict for the defendant at the conclusion of the evidence offered by plaintiff, the defendant abandoned his plea of set-off. He asked for no judgment on it and as he did not it was unnecessary for him to offer proof in its support. This is such an elementary proposition of law that no authority need be cited in its support.

SET-OFF: abandonment of plea.

The third assignment is "That court erred in holding that the burden of proof was on the plaintiff." But a word is necessary to dispose of this assignment and perhaps we can not do better than to quote the brief of the defendant on this point. It says: "The declaration was on the common counts. The defendant pleaded non-assumpsit; that put the burden of proof on the plaintiff." If the defendant had attempted to prove a set-off it would have put the burden of proof as to that on him, but having abandoned this plea and the issue being non-assumpsit, the burden of proof was on the plaintiff. The obligation to prove any fact lies upon the party who substantially asserts the affirmative of the issue. 1 Greenleaf on Ev., sec. 74.

The fourth assignment of error is that "The court erred in refusing to allow plaintiff to prove the admission of the defendant 'That defendant was paying plaintiff \$30 per month and board.' "

In examining the record we can find no evidence of any such ruling nor is any such noted in the transcript before us and there is no question raised as to the transcript not being

correct. It nowhere appears that any evidence was offered and refused that defendant was paying plaintiff \$30 per month and board, as set out in this assignment. Even if there had been, we do not think that the question would have been proper, as this action is brought on the theory that no special contract for compensation had been made. The plaintiff is only seeking to recover on a quantum valebat, in other words, to recover what his services were worth and not on a special contract for hire. No special contract was pleaded. Where the consideration for the services is fixed by contract, assumpsit, for work and labor done on a quantum meruit, will not lie. 1 Am. and Eng. Ency. Law, p. 884 and note.

The fifth assignment is "That the court erred in holding that the relationship between plaintiff and defendant barred plaintiff from recovering anything for the work and labor performed by the plaintiff for the defendant." This exception

PARENT and child:
claim for support. covers the gist of the entire action. It is not denied that the plaintiff did some work for the defendant, just how much is hard to tell, and

it is also in proof that the plaintiff and his wife lived for some years at the house of the defendant in town and also at his house in the country, and that this suit was not brought until after the plaintiff and his wife had separated. The question then is did the plaintiff and his wife live with the defendant in loco parentis from the time of their marriage in 1888 to about the time of the commencement of this suit. On the answer to this question the result of this suit hinges. A great many cases have been decided involving this point. There are but few of the older states, if any, where the question has not been adjudicated in one form or another, and their rulings are nearly uniform in character. The decisions are to the effect that persons living together as one family, i. e. in loco parentis, can not recover for wages and services performed on the one hand, or for board and necessities on the other, without an express contract being proven that such compensation should be paid and received. A contract to pay will not be implied where it is shown that the person rendering

the services is a member of the family of the person served, and receiving support therein, either as parent, child or other near relative. A presumption of law arises that such services are gratuitous. 17 Am. and Eng. Ency. Law, p. 336.

The person claiming compensation must go a step further, and establish that there was an expectation by both parties that a compensation should be paid. 17 Am. and Eng. Ency. Law, p. 337.

This rule of law is salutary and tends to the happiness and good order of society in preventing quarrels and litigation. If it were not for this wise rule we would constantly see persons who live under the same roof quarreling; members of the same family who by choice or circumstances live together, on account of slight differences, would be constantly suing each other for pretended claims for services rendered or for board and necessities furnished. The law says this shall not be, and that if persons live together as a family, without any express contract or agreement to the contrary, the board and necessities given by one shall be equivalent to the work and services performed by the other, and that neither shall recover from the other without an express contract.

The adjudicated cases holding this are very numerous, so many in fact that we will only cite a few of them. *Oxford v. McFarland*, 3 Ind. 156; *King v. Kelly*, 28 Ind. 89; *Leidig v. Coover, Ex.*, 47 Pa. St. 534; *Butler v. Slam*, 50 Pa. 461; *Hall v. Finch*, 29 Wis. 286.

In the Wisconsin case the authorities are gone into extensively. In *Hartman's Appeal*, 3 Grant, p. 271, the court says: "And as under the circumstances the law implied no obligation on the party of the deceased to pay, before the appellant can claim as a creditor he must prove an express contract."

In *Bash v. Bash*, 9 Pa. St., p 260, the court says: That the evidence of the contract must be direct and positive and that it is error to instruct the jury that instead of such evidence it was sufficient if it was clear and satisfactory and thus put such a contract to proof on the same footing as a contract

between strangers unaffected by any personal relation. In *Duffy v. Duffy*, 44 Pa. St. 399, the court says: "It was clearly error on the part of the court to charge the jury, that in the absence of an agreement with the father not to charge, the plaintiff was entitled to recover a reasonable compensation, the amount of which will be determined by the jury. The very reverse of this would have been sound law."

In the present case it will be remembered that the plaintiff was married to the daughter of the defendant; that for some years plaintiff and his wife resided at the house of the defendant in Old Albuquerque and that since that time they lived at his house on a ranch belonging to the defendant, some eighteen miles from Albuquerque. The plaintiff swears that he and his father-in-law never made any contract as to any compensation or wages to be paid him for what he did. A portion of the testimony upon this point is as follows:

"Q. Did you settle up with Mr. Candelaria very frequently?

"A. No, sir; never.

"Q. Did you never have any settlement with him at all?

"A. No, sir.

"Q. You never had any; you never presented him with any account and he never presented you with any; is that the case?

"A. No, sir.

"Q. You just kept working there, and he kept furnishing the board and the grub and the matter just ran along for seven years, did it?

"A. Yes, sir.

"Q. Did you and Mr. Candelaria ever enter into any written contract in regard to business between you of any kind?

"A. No, sir.

"Q. You never had any understanding with him, only you were working there and he would pay you during all that time, you expected him to pay you for your work?

"A. I expected to be repaid for my work.

"Q. You were expecting to be paid for your work was all the arrangement or understanding you had with him, was it?

"A. Yes, sir.

"Q. You had no other?

"A. No, sir.

"Q. And this ran all the way through the whole seven years you worked for him?

"A. Yes, sir.

"The Court: You never had any contract or arrangement with him at any time as to how much you were to receive for the month or day or any time?

"A. No, sir."

If the evidence failed to show, if the parties were living as members of one family, that the services for which the plaintiff seeks to recover were rendered in pursuance of an express agreement that they were to be paid for by the defendant, then the plaintiff must lose his case, and he acknowledges that there was no existing contract or understanding.

Were these people then living in loco parentis? We think they were. The son-in-law was for some nine years living with his wife at the house or ranch of his father-in-law, who supplied them with food and necessities, and during all of that time the son-in-law never asked for a settlement or made any demand for wages. The presumption is very strong that if plaintiff and his wife had not separated they would still be living at one of the houses of the defendant as they had done for so long a time and that this suit would never have been brought. There is no error in this ruling of the court.

The first and sixth assignments of error are merely formal. The first is: "The court erred in instructing the jury to return a verdict for the defendant." The court found and the evidence shows that plaintiff and defendant were living in loco parentis and so this instruction to the jury was a proper one. The supreme court of the United States says that

where on undisputed facts plaintiff is not entitled to recover, the court may direct a verdict. *National Bank v. Ins. Company*, 103 U. S. 783.

The sixth assignment is that "The court erred in overruling plaintiff's motion for a new trial of this cause." A motion for a new trial is addressed to the sound discretion of the court and the decision of the court in granting or refusing it alone is not the proper object of exception. The universal rule of practice is that matters resting in discretion are not re-examinable in the court of errors. *Coleman v. Bell*, 4 N. M. 21; *Pomeroy v. Bank*, 1 Wall. 592; *Springer v. United States*, 102 U. S. 586.

There is no error in the record and the judgment of the court below is affirmed.

Parker, McFie and Leland, JJ., concur; Crumpacker, J., having tried the case below, did not sit in this case.

[No. 720. August 23, 1898.]

THE DENVER & RIO GRANDE RAILROAD COMPANY, Plaintiff in Error, v. UNITED STATES OF AMERICA, Defendant in Error.

SYLLABUS BY THE COURT.

PUBLIC LANDS—CUTTING TIMBER—PRESUMPTION—BURDEN OF PROOF.—

In actions in trover for alleged unlawful cutting of timber from the public domain, when the defendant proves that it had a lawful right, under a grant given by act of congress, to enter on public lands adjacent to its railroad line, and cut timber therefrom, for certain specified purposes, the presumption is that such cutting was done in accordance with the terms of the act, and not contrary thereto. The burden of proof is on the plaintiff to show that the grantee exceeded the terms of its grant, and not on the defendant to show that it had not.

Error, from a judgment for the United States, to the First Judicial District Court. Reversed and remanded.

The facts are stated in the opinion of the court.

WOLCOTT & VAILE and E. L. BARTLETT for plaintiff in error.

W. B. CHILDERS, United States district attorney, and A. A. JONES, special assistant, for the United States.

The court properly instructed the jury that the burden of proof was on defendant to show that it required the lumber for its railroad line and uses as authorized by law, delivered to it at the sawmill at Lumberton between the time the mill was located there and the time it was removed from that place. *Railroad Co. v. Lewis*, 162 U. S. 376; *State v. Riche-son*, 45 Mo. 578; *U. S. v. Cook*, 36 Fed. Rep. 897; *U. S. v. Murphy*, Id. 378; *Nelson v. U. S.*, 30 Id. 116.

MILLS, C. J.—This is an action in trover originally brought before the district court of the First judicial district by the United States to recover from the defendant, the Denver & Rio Grande Railroad Company, the sum of ninety-six thousand dollars, for the conversion of certain logs, lumber and timber, which the plaintiff claimed were manufactured out of trees theretofore standing and growing upon certain public lands, situated in the county of Rio Arriba, in New Mexico, in said First judicial district. To the declaration, the defendant pleaded not guilty, issue was joined and early in January, 1897, the case came on for trial before a jury, and after a trial lasting nearly two weeks, on the fifteenth day of January, the jury found the defendant guilty and assessed the damages against it at six thousand two hundred and eighty-two dollars. Immediately thereafter the defendant gave notice of a motion for a new trial, and in arrest of judgment, and on January 22 of the same year filed said motion, arguments on which were had on the following day, and the motion was denied, and judgment was duly entered.

To this judgment the defendant duly excepted, and afterwards a bill of exceptions was signed, settled and sealed and the

case came to this court for hearing on error. At an adjourned term of this court held in January, 1898, argument was had upon a motion to dismiss the writ of error on the ground that the assignment of error being all based upon alleged errors occurring during the trial, and none upon the record proper, that there was no bill of exceptions upon which the assignments could be based. This motion the court overruled. 51 Pac. Rep. 679.

The facts may be briefly stated as follows: The Denver & Rio Grande Railway Company, its successors and assigns, under and by virtue of an act of congress, approved June 8, 1872 (17 U. S. Stat. at Large, p. 339), and the act of March 1, 1877, amendatory thereof (19 U. S. Stat. at Large, p. 405) had the right to take from the public lands adjacent to its road, constructed prior to June 8, 1882, timber for the construction and repair of its railroad. It had constructed by June 8, 1882, a fraction of a mile less than eleven hundred and thirty miles. The Denver & Rio Grande Railroad Company, the plaintiff in error herein, is the successor and assignee of the Denver & Rio Grande Railway Company, and has succeeded to all of its rights and privileges under the aforesaid acts of congress.

The railroad company on March 14, 1893, appointed the New Mexico Lumber Company its agent, and authorized it to enter upon the public lands of the United States adjacent to, or in the neighborhood of its lines of railway constructed prior to June 8, 1892, and on its behalf and for it, to take therefrom such timber as might be necessary for the construction and repair of such portions of its line as were built prior to the last mentioned date.

In this agreement, which was accepted by the lumber company, in writing, the railroad company expressly set out that it did not authorize its agent to commit any waste upon the public lands or to cut, destroy or take away any timber not required for its purposes as aforesaid, nor to cut or remove any timber for it on the public lands, except, so far and to such extent as to amounts and quantity as it was specially

authorized to do. It is in evidence that when the railroad company needed lumber it always gave written orders therefor.

The proofs adduced in the trial in the lower court and the stipulations entered into between counsel, showed that from January, 1894, to August, 1895, the New Mexico Lumber Company had cut some seven million, five hundred thousand feet of lumber, board measure, principally from the lands described in the declaration, and had sawed the same at its mill at Lumberton and that of this lumber two million, one hundred and thirty thousand feet was delivered to the railroad company, for its use, upon its written orders; that the difference between these amounts or five million three hundred and seventy thousand feet was taken by the lumber company of its own volition. It is not contended that the railroad company is responsible therefor. The contention in this case, therefore, is only as to the two million, one hundred and thirty thousand feet admitted to have been delivered to the railroad company upon its written orders.

Numerous grounds of error are assigned, some of which were no doubt put into the record out of abundant caution. We do not consider it necessary for the proper termination of this case to take up these assignments seriatim.

The railroad company had a right under acts of congress above referred to to cut such timber from the public lands adjacent to its line as was necessary for the repair of such portions of its road as was constructed prior to June 8, 1882,

and having such right, it was lawful for it to go upon public lands adjacent to its road, and cut such timber as it might require for the repairs of such parts of its line as were constructed prior to June 8, 1882. The act of congress gave it such right. This right is not a mere license; it is more. It is a solemn grant given by special act of congress. Having lawfully entered upon the public lands for the purpose of cutting such timber, the presumption attaches that neither the railroad company nor its agent exceeded the terms of the grant and the United States must prove (the same as any individual

PUBLIC lands: cutting timber: presumption.

would have to, if he had given a similar grant to cut timber from lands privately owned by him) that the grantee had exceeded its grant, and had cut timber in greater quantity or for other purposes than it had a right to do.

It is a presumption of law that one acting under a grant or license is presumed to act according to its terms and not in violation thereof. The presumption is that the terms of such grant or license are not exceeded, and not that they have been. To hold otherwise would be to presume that the grantee or licensee had committed wrongful acts instead of presuming that he had acted lawfully. In other words, the defendant would have to prove his innocence, instead of the plaintiff being obliged to prove him guilty. This is not the policy of our law. It is the wrong doctrine to prove, as was done in this case, that the railroad company had taken certain timber under a grant, and then cast the burden of proof on it to show that it had used such lumber lawfully. The presumptions are that the company acted in good faith, and the burden of proof is upon the United States to show the contrary.

The sole issue presented is, has a wrongful conversion been committed? The burden of proving this is on the United States as the company had the legal right to enter upon these lands and cut timber for certain purposes. The United States introduced a sufficient amount of evidence to prove that the railroad company had, through its agent, cut timber in controversy from the lands described in the declaration; in fact to make out a *prima facie* case, but this does not shift the burden of proof. *Heineman v. Hurd*, 62 N. Y. 448.

The averment which the plaintiff was bound to maintain was that the railroad company was guilty of an illegal conversion of timber cut. In answer to this the defendant offered in evidence the act of congress. By so doing it did not assume the burden of proof, which still rested upon the plaintiff but only sought to fix the status of the case. *Gilmore v. Wilbur*, 18 Pick. 517.

Under the general issue, which was the plea in this case, the burden of proof was upon the plaintiff throughout as to every part of its case. *Berringer v. Lake Sup. Iron Co.*, 41 Mich. 305; *Heineman v. Hurd*, supra; *Gilmore v. Wilbur*, supra; *Central Bridge Co. v. Butler*, 2 Gray 130.

The principle on which we will determine this case, seems, indeed, to have already been decided by this court in the case of the *United States v. Rutledge*, 8 N. M. 385. This was a case where the defendant was convicted of the unlawful cutting of timber upon public land. The evidence showed that the defendant had a mineral entry, and that he had cut timber therefrom. At the trial the court charged the jury that the burden of proof was upon the defendant to show that the timber he had cut from his claim was to be used for agricultural, mining or domestic purposes. In reversing this case the supreme court said:

“As to the former of these paragraphs, it is to be said that the learned judge was evidently proceeding upon the theory that the defense set up was of extrinsic matter, in the nature of a confession and avoidance, or, in other words, that it was an affirmative defense, and therefore to be proved by a preponderance of evidence. It is readily seen that the facts which would constitute a license or authority to cut timber upon public lands should be established by a preponderance of proof, but in this case there was no question about defendant having shown that he had a mineral entry, and, indeed, the court instructed the jury that he did have. A license to cut timber on this mineral entry for certain purposes having been shown the question of guilt or innocence rested not upon the fact of his cutting timber there, but whether or not the cutting was or not for the purposes allowed by law. We think that if it is shown that defendant was lawfully on said premises and that he had a lawful right to cut timber for the purpose for which he was there, then there is a presumption that whatever cutting he did was in furtherance of such purpose. The rule the court gave the jury was tantamount to telling

them that, notwithstanding the defendant has established his right to cut timber on his mineral entry, yet he must also show by a preponderance of evidence that he has not violated the law by so doing. Apparently, the defendant is acting within the law when his mineral entry is admitted to exist, but the court says the act of cutting is presumed to be for other than mining purposes, and he must show by a preponderance of proof that it was not for other purposes. The defendant, though held by the court to be in position of one setting up an affirmative defense is required to establish a negative proposition. It may be conceded that when the prosecution showed that the timber was cut on public land there would be prima facie evidence of unlawful intent, and if the case rested there a verdict of guilty would be justified; but when the defendant showed that he was lawfully on said land, and has a right to cut timber for specified purposes, this prima facie showing of unlawful intent would be removed, and the burden would be on the prosecution to prove, or have proved, beyond a reasonable doubt the existence of such unlawful intent."

In the case at bar the court below, in its charge gave one instruction as follows:

"4. You are instructed that the defendant is bound to show that it required the two million, one hundred thirty thousand feet of lumber, board measure, for its railroad line and uses, as authorized by law, delivered to it by the said lumber company, at its sawmill at Lumberton, between the first day of January, 1894, and the month of August, 1895, or more correctly speaking, between the time the said sawmill was located at Lumberton, and the time it was removed from that place."

Among the requests of the defendant for instructions to be given to the jury, by the court is one numbered 14, number 13 of the assignment of errors, as follows:

"In this case it was admitted by the plaintiff, the United States, that the defendant, the Denver & Rio Grande Railroad Company, has the right, by act of congress, to take from public lands adjacent to that part of its railroad constructed

prior to June 8, 1882, timber required for the repair of that part of the railroad line of the defendant railroad company constructed prior to June 8, 1882. Under these circumstances, the burden is on the plaintiff to prove, by a preponderance of the evidence, that the timber actually taken from the specific public lands named in the declaration was used by the defendant railroad company for some purpose or at some place not permitted by the act of congress already mentioned. If, in your opinion, the plaintiff has failed to establish such improper use, by a preponderance of the evidence, then your verdict should be in favor of the defendant."

The refusal to give this instruction requested by the defendant railroad company, and the giving of instruction 4, *supra*, which is contrary to the established rules of law and evidence, as to the burden of proof being, as we believe, reversible error, it is not necessary for us to consider the other assignments, but the judgment below is reversed and the case remanded to the district court of the First judicial district with instructions to grant a new trial and proceed in accordance herewith.

Crumpacker, Leland, Parker and McFie, JJ., concur.

[Nos. 721, 731. August 23, 1898.]

THE DENVER & RIO GRANDE RAILROAD COMPANY, Plaintiff in Error, v. UNITED STATES OF AMERICA, Defendant in Error.

UNITED STATES OF AMERICA, Plaintiff in Error, v. DENVER & RIO GRANDE COMPANY, Defendant in Error.

SYLLABUS BY THE COURT.

EVIDENCE—SPECIAL ACTS OF CONGRESS.—Special acts of congress are required to be proven on the trial of a cause the same as any other fact.

Error, from a judgment for the United States, to the First Judicial District Court. Reversed and remanded.

The facts are stated in the opinion of the court.

WOLCOTT & VAILE and E. L. BARTLETT for the Denver & Rio Grande Railroad Company.

The lands described in these causes were "adjacent" to the railroad company's lines, within the meaning of the act of congress of June 8, 1872. U. S. v. Railway Co., 150 U. S. 1; U. S. v. Railway Co., 31 Fed. Rep. 886 (899); U. S. v. Chaplin, Id. 890; U. S. v. Lynde, 47 Id. 297; U. S. v. Bacheldor, 48 Pac. Rep. 310; U. S. v. Railroad Co., 29 Alb. Law Jour. 24.

The taking of these ties by the railroad company was not a willful trespass upon the public domain. Lawson on Presumpt. Ev., Rules 19, 68, pp. 93, 276.

W. B. CHILDERS, United States district attorney, and A. A. JONES, special assistant, for the United States.

The lands from which the ties were cut were not, as a matter of law, adjacent to the line of the railroad. U. S. v. Bacheldor, 48 Pac. Rep. 310; Stone v. U. S., 64 Fed. Rep. 667; Same v. Same, 17 Sup. Ct. Rep.; 8 Dec. Dept. Int. 41.

The taking by the railroad company of the ties was a willful trespass upon the public domain. Leland v. Wilkinson, 6 Pet. 322; Stone v. U. S., 64 Fed. Rep. 667; Same v. Same, *supra*.

MILLS, C. J.—The above entitled causes were considered and heard as one in this court. They grow out of a suit in trover brought in the First judicial district of this territory by the United States against the Denver & Rio Grande Railroad Company, to recover five thousand dollars alleged damages for the conversion of certain timber and railroad ties taken by the defendant from the public lands. Judgment was given in favor of the United States for one hundred and

seventy-four dollars. Both sides sued out writs of error alleging on the one side that no judgment for any amount should have been given and upon the other that it was too small. No evidence was taken in the trial before the lower court, as the case was submitted entirely upon a stipulation and the rulings thereon.

This stipulation evidently does not cover all the facts in the case, as it fails to show the contents of a special act of congress, approved June 8, 1872, and an act amendatory thereof approved March 3, 1877, and as the law required special acts to be proven on the trial of a cause the same as any other fact, as its contents do not appear in the record we can not take judicial knowledge thereof. *Leland v. Wilkinson*, 6 Peters 317; 1 Wharton on Ev., S. 291, and cases cited in note.

As both sides complain of the judgment below, and as both ask for new trial we have, upon consideration, in the interest of justice and in order that a trial may be had upon the merits, concluded to grant the request.

The judgment entered below is therefore reversed, and the case is remanded to the First judicial district court with instructions to grant a new trial.

Leland, Parker, McFie and Crumpacker, JJ., concur.

[No. 659. August 24, 1898.]

EUGENE A. LEVY, Plaintiff in Error, v. JOSE A.
ORTEGA, Defendant in Error.

SYLLABUS BY THE COURT.

STATUTES REPEALED—INTERFERENCE WITH ACEQUIUS.—Section 39, Compiled Laws of 1884 is repealed by chapter 1 of the laws of 1895, and a judgment entered under the former subsequent to the passage of the latter act is illegal and void.

Error, from a judgment by default, to the Fifth Judicial District Court, Socorro County, upon a sentence of the justice of the peace of Precinct No. 16, sentencing defendant to pay a fine of ten dollars and costs. Reversed and remanded, with directions.

FRANCIS BUCHANAN for plaintiff in error.

Sec. 39, chap. 1, Comp. Laws 1884, under which plaintiff in error was tried and convicted, was expressly repealed by an act of the legislature passed February 28, 1895. Sec. 7, chap. 1, p. 15.

FREEMAN & BAOA for defendant in error.

CRUMPACKER, J.—On the eighth day of April, 1895, Jose Arcadia Ortega lodged with the justice of the peace of precinct number 16, in Socorro county, his complaint, alleging that he was mayordomo of the public acequia of Sabinal, and that on March 24, 1895, Eugene A. Levy, plaintiff in error had unlawfully appropriated the waters of said acequia. Upon this complaint, the said Levy was tried by jury, which found the following verdict, "We, the jury, unanimously have found the accused guilty according to sec. 39 of the Compiled Laws of 1884." Upon the verdict the justice of the peace sentenced the defendant to pay a fine of ten dollars and costs; from which decision the plaintiff in error prayed for and was granted an appeal to the district court. Plaintiff in error failed to docket his appeal in the district court, whereupon the defendant in error docketed the cause and upon motion for judgment for such failure the district court dismissed the appeal and on May 17, 1895, affirmed the judgment of the court below. Subsequently the court overruled the motions of the plaintiff in error to set aside the default and to vacate the judgment.

We find that section 39 of the Compiled Laws of 1884 was repealed by necessary implication at the time this proceeding was instituted, by chapter 1 of the laws of 1895, and no

proceeding could be maintained under it. The judgment being void, the same is reversed and the cause remanded to the district court of Socorro county, with directions to set aside the judgment and dismiss the cause.

Mills, C. J.; McFie, Parker and Leland, JJ., concur.

[No. 728. August 26, 1898.]

FREDERICK SCHOLLE, Plaintiff in Error, v. MAXIMILIANO PINO, Defendant in Error.

SYLLABUS BY THE COURT.

- SET-OFF—JUDGMENTS IN CROSS-ACTIONS—ASSIGNMENTS.**—1. Judgments in cross-action may be set off, the one against the other, when the parties in interest are the same, on motion addressed to the court in which one or both of the actions is pending.
2. If, after both such judgments or claims are matured, one party assigns his judgment or claim, such set-off will be allowed notwithstanding such assignment.

Error, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County. Motion by defendant in error for affirmance. Affirmed. Motion by plaintiff in error for set-off. Granted.

The facts are stated in the opinion of the court.

NEILL B. FIELD for plaintiff in error.

The attorney's lien at common law existed only as to any balance which might be due to the client after the right of set-off was allowed. The right to the taxed costs was superior to the right of set-off, but we had no such taxed costs in this territory (as are provided by the Code of Civil Procedure) when this judgment was recovered. No services were performed by the attorney for Pino for which even under the code they would be entitled to have costs taxed against Scholle.

12 Am. and Eng. Ency. of Law 150; 2 Par. Con. 736; 3 Id. 269; 2 Black on Judg., sec. 1000; Wat. on Set-off 390; Pierce v. Bent, 69 Me. 385; Schermerhorn v. Schermerhorn, 3 Caine Rep. 189; Sowles v. Witters, 40 Fed. Rep. 413; Insurance Co. v. Rider, 39 Mass. 210; Wright v. Cobleigh, 23 N. H. 32; Moody v. Towle, 5 Me. 359; Hooper v. Brundage, 22 Me. 460; Greene v. Hatch, 12 Mass. 195; Bridges v. Smyth, 8 Bing. 431; Prince v. Fuller, 34 Me. 122.

TOMAS C. MONTOYA and WARREN, FERGUSON & GILLET for defendant in error.

LELAND, J.—This cause comes into this court on error to the district court of Bernalillo county.

The plaintiff in error having failed to prosecute his case in this cause, and the defendant in error having duly made a motion herein for an affirmance of the judgment of the lower court, and no reason being offered as to why such judgment should not be affirmed, said judgment is hereby affirmed with costs, and ten per cent damages.

Though plaintiff in error failed to prosecute his writ of error in this case, he has filed in this case a motion to set off a judgment owned and held by him against this defendant in error, which motion is duly supported by affidavits. From the record, papers and motions on file in this court, the following state of facts exists in this case: Defendant in error herein recovered a judgment against plaintiff in error herein in the court below for the sum of twelve hundred and sixty-three (\$1,263) dollars and costs, to reverse which judgment plaintiff in error prosecuted error in this court. During the pendency of this case in the supreme court of New Mexico plaintiff in error in this case prosecuted and recovered a judgment in a different action, in Valencia county, New Mexico, against the defendant in error in this action for the sum of two thousand, four hundred and seven (\$2,407.48) dollars and forty-eight cents debt, with interest from October 15, 1897, and costs, including two hundred and forty (\$240.78) dollars and seventy-eight cents attorney's fees. On the eighth day of

July, defendant in error assigned all his interest in the judgment below against plaintiff in error herein, to S. B. Gillett and Thomas C. Montoya, two of his attorneys of record herein. Plaintiff in error seeks by his motion herein to set off his judgment against defendant in error to the extent of the judgment of defendant in error, notwithstanding the assignment of defendant in error.

On this motion invoking the court to permit one judgment to be used as a set-off against another, we think the law is well settled in this country that courts have full and complete power to make such orders allowing one to set-off the other pro tanto where they are between the same parties.

SET-OFF: judgments in cross-actions: assignment.

In the case of *Pierce v. Bent*, 69 Maine 381, decided in 1879, the court said in speaking of this question, "It is well settled, both in England and this country, that judgments in cross action may be set off the one against the other, when the parties in interest are the same, on motion addressed to the court in which one or both of the actions is pending. If the amounts are equal, both will be satisfied. If the amounts are unequal, the smaller will be satisfied in full, and the larger to the extent of the smaller, and an execution will issue for the balance. Such a set-off will not be allowed to defeat an attorney's lien for costs, but his lien extends only to the taxable costs. An assignment will not defeat the right of set-off if both causes of action existed which the assignor did not have and if the right of set-off had attached at the time of the assignment, as it always does when both causes of action have then matured the assignee must take the demand—cum onere—with the right of set-off still clinging to it; nor will it make any difference that one of the judgments is against a principal and his sureties. A judgment in favor of the principal alone may be applied in satisfaction of one against him and his sureties.

And the right of set-off in this class of cases is not dependent upon statutory law. It exists at common law. All of these propositions are sustained by adjudged cases, as well

as the leading text books. The cases are too numerous for citation. The right to have the set-off moved for in these cases made, is unquestionable. All possible objections to it are fully answered by the authorities and text writers. In support of this opinion the court cites: *Goodenow v. Buttrick*, 7 Mass. 140; *Greene v. Hatch*, 12 Mass. 195; *Winslow v. Hathaway*, 1 Pic. 211; *Moody v. Towle*, 5 Maine 415; *Ocean Ins. Co. v. Rider*, 22 Pick. 210; *Burnham v. Tucker*, 18 Maine 179; *Hooper v. Brundage*, 22 Maine 460; *Prince v. Fuller*, 34 Maine 122; *New Haven Copper Co. v. Brown*, 46 Maine 418; 2 *Parsons on Contracts* 242.

We think this case fully states the doctrine as well as the practice in the matter of setting off one judgment against another. In the case at bar both claims existed and were mature at the time of the assignment, and following the law, as laid down in the case from which we have quoted at length, we hold that the set-off may be allowed in this case to the extent of the judgment recovered by the defendant in error, and execution may issue to obtain satisfaction for the unsatisfied portion of the judgment owned and held by plaintiff in error. Inasmuch as attorneys have no lien for costs in this jurisdiction, that question does not arise in this case. Messrs. Montoya and Gillett took their assignment of the judgment of defendant in error burdened with this right of set-off, and as their assignor could not give them a better title than he had, their title falls with that of their assignor.

McFie, J.; Mills, C. J.; Crumpacker and Parker, JJ.,
concur.

[No. 735. August 26, 1898.]

PRICE & WALKER, Plaintiffs in Error, v. W. H. WOOD
and E. W. PARKER, Defendants in Error.

SYLLABUS BY THE COURT.

ACTION ON CONTRACT—PAROL EVIDENCE.—1. Courts will not admit evidence on the trial of an action based on a written contract, the effect of which would be to vary its terms from their plain intent and meaning.

2. When such evidence is inadvertently permitted to go to the jury, it is the duty of the court to withdraw such evidence.

Error, from a judgment for plaintiff, to the Fifth Judicial District Court, Lincoln County. Affirmed.

The facts are stated in the opinion of the court.

JOHN Y. HEWITT for plaintiffs in error.

GEORGE W. PRICHARD and J. E. WHARTON for defendants in error.

The admission of a firm debt by one of the partners is binding on the firm. 17 Am. and Eng. Ency. of Law 1077, and citations.

LELAND, J.—This cause comes into this court on error to the district court of Lincoln county.

This was an action in assumpsit based on a simple written contract wherein plaintiff in the court below recovered a verdict and judgment thereon against the defendant below for the sum of eleven hundred and twelve (\$1,112.98) dollars and ninety-eight cents and costs of suit.

The following assignments of error are made by plaintiffs in error, to wit:

“1st. The court erred in not permitting the plaintiffs in error to prove that they offered to pay balance due on

February 1, 1898, for goods actually sold by them up to that date, and to turn over to Weed and Parker the residue of the stock then remaining unsold and in their hands.

"2d. The court erred in withdrawing from the jury such testimony of the plaintiffs in error as has been submitted tending to prove their compliance with the contract.

"3d. The court erred in instructing the jury to find the issues for the plaintiff below.

"4th. The court erred in giving judgment for the plaintiffs below for the sum of \$1,112.98 against defendants below upon the evidence submitted in this cause."

The written contract on which plaintiffs below rely, and which was attached to plaintiffs' declaration, and marked "Exhibit A" is in the following words and figures, to wit:

"White Oaks, New Mexico, Feb. 1st, 1895.

"This agreement made this first day of February, 1895, between W. H. Weed and E. W. Parker of the first part and Merrit, Price & Company of the second part, is as follows:

"That, Whereas W. H. Weed and E. W. Parker have this day turned over the sale of a certain stock of dry goods known as the Schwartz stock, invoiced at (\$1,541.54) fifteen hundred and forty-one and 54-100 dollars to be paid for by Merrit, Price & Co., in the following manner: On the first day of May, 1895, Merrit, Price & Co., pay over all money received from the sale of said goods at invoice price to W. H. Weed and E. W. Parker; thence on the first day of August, 1895, pay over in like manner; thence on the first day of November, 1895, pay over in like manner; thence Merrit, Price & Co., bind themselves to make a full settlement for all of said goods left on their hands, less this commission on or before the first day of February, 1896.

"W. H. Weed,

"W. W. Parker,

"Merrit, Price & Co."

In the matter of the first assignment of error we do not think the point well taken, because there are no allegations

SUIT on contract:
parol evidence.

in the pleadings, nor provisions set out in the written contract that would warrant the trial court in admitting evidence to prove the matters contended for by defendants. As to the second assignment of error we discover no error because, on examination of the record, we find that the kind of evidence defendants introduced to prove their compliance with the terms of the contract would necessitate a construction of the contract wholly different from the plain terms of the contract; in short, the admission of such evidence would have involved such a construction of the contract as would have amounted to the making of a new contract for the parties.

We find no error in the matter of the third assignment of error, because the written contract on which this action is based is admitted by all parties to be genuine; the contention seems to be wholly as to its construction, plaintiffs in error contending that it does not evidence an absolute and unconditional sale of the property, while defendants in error contend that it evidences an absolute and unconditional sale. While the contract is without question loosely drawn, we are unable to give it the construction contended for by plaintiffs in error, to wit, that of a contract between a principal and factor, construing the entire contract together, and allowing the language of the contract to be one of absolute and unconditional sale. It consequently follows that the fourth error assigned is not well taken. As no questions were raised in the trial court as to the questions of parties, or sufficiency of the declaration, we are not called upon to pass upon anything save the questions raised.

Judgment affirmed with costs.

Parker, J.; Mills, C. J.; Crumpacker and McFie, JJ.,
concur.

[No. 784. August 26, 1898.]

THE TERRITORY OF NEW MEXICO, Appellee, v.
BELTRAM WILLIAMS, Appellant.

SYLLABUS BY THE COURT.

CRIMINAL LAW—PERJURY—EVIDENCE—SUFFICIENCY.—The evidence of one witness alone, not corroborated by any other evidence, is insufficient to warrant a conviction on a charge of perjury.

Appeal, from a judgment of the Third Judicial District Court, Dona Ana County, convicting defendant of perjury. Reversed and remanded.

The facts are stated in the opinion of the court.

J. F. BONHAM for appellant.

The evidence in this case is not sufficient to support the charge of perjury. Bish. New Crim. Prac. 920; State v. Lea, 3 Ala. 602; State v. Garland, 3 Dev. (N. C.) 114; Juaraquin v. State, 28 Tex. 625.

The falsity of the oath of the accused upon which perjury is assigned can not be established by the testimony of one witness only. It must be established by the testimony of one reliable witness and such corroborative facts and circumstances as will give a clear preponderance of the evidence in favor of the state to the exclusion of a reasonable doubt of the guilt of the accused. U. S. v. Wood, 14 Pet. 430; 2 Hawk. Pleas Crown 591; Arch. Crim. Pl. 157; Dane's Abr. 82; Grandy v. State, N. W. Rep. 747; Thomas v. State, 51 Ark. 138; 18 Am. and Eng. Ency. of Law 323; Aguire v. State, 21 S. W. Rep. 256; 7 Am. and Eng. Ency. of Law 794.

EDWARD L. BARTLETT, solicitor general, for the territory.

LELAND, J.—This cause comes into this court on appeal from the district court of Dona Ana county.

This prosecution was an indictment based on the statute making it a felony to knowingly and willfully swear to and present a false account against a county, etc. The indictment alleges that one Beltram Williams made out and swore to an account, and presented the same for allowance against said Dona Ana county for \$69.08, said amount of charges being as claimed by said Williams for mileage and per diem for one guard or assistant so employed by him to transport one Dick Wilson, a prisoner, from Springer, New Mexico, to Las Cruces, New Mexico. Said indictment further alleges that such charge for mileage and per diem was false.

Defendant Williams was tried in said court on this charge of perjury, and convicted, and now seeks a reversal of said verdict and judgment of conviction.

Twenty-three different grounds of error were assigned in defendant's motion for a new trial, and which appear on the face of the record for examination in this court.

The second assignment of error, to wit: That "The verdict of the jury is contrary to the evidence," we think well taken, after an examination of all the evidence in the case. The record does not raise in our minds a question as to the weight of the evidence, but an absence of evidence. The whole evidence discloses the fact, which is not disputed, that defendant Williams was a constable in and for a certain precinct in Dona Ana county, and as such officer went to the town of Springer, the county seat of Colfax county, armed with a warrant for the arrest of one Dick Wilson, who was then charged with a felony; that Williams found Dick Wilson in the jail at Springer, and took him by rail to Las Cruces, Dona Ana county, and lodged him in jail.

In order to effect a lawful conviction of defendant, it was incumbent on the territory to prove, first, that the alleged

false oath to said alleged false account was made at Dona Ana county, in the territory of New Mexico, by this defendant; second, that said account was presented by this defendant to the proper accounting officer or officers for allowance; third, that defendant knowingly and willfully swore to such false account; and, fourth, that such account was, as a matter of fact, false, and each and every one of these elements of the crime of perjury as counted on in the indictment must be proved beyond a reasonable doubt; if the territory fail to prove any one of these elements of the offense, then the defendant must be acquitted.

That the defendant did make out an account against Dona Ana county for the amount alleged in the indictment, and swore to the same, and presented the same to the proper officers for allowance, is admitted by defendant. This disposes of the first three elements of the offense. The question

PERJURY: evidence: sufficiency.

remaining for examination is, did the territory prove, as the law requires, that defendant did not employ and have a guard or guards from Springer, New Mexico, to Las Cruces, New Mexico? We think not. One witness only, and that the prisoner who had been arrested by this defendant on a charge which was a felony, in his examination testifies that this defendant had no guard assisting in his transportation, while on a very fair cross-examination by counsel for defense, the same witness is not very sure about the matter. This is the only actual evidence adduced by the state on this point. This evidence alone, and uncorroborated, is not such proof as the law requires in trials for perjury; it is one oath against another, and if the citizens of this territory can be convicted of perjury and sent to the penitentiary for a term of years, and their characters ruined for life by oath against oath, as in this case, then the best citizens may well shun the courts as a traveler would quicksand. We may add that the record in this case discloses that defendant proved by a preponderance of evidence that he did employ two guards to assist in transporting the prisoner, Dick Wilson, and that without this proof

introduced by the defendant as to this element of the offense charged, the court below, should have directed a verdict of acquittal. This one assignment of error being sufficient to warrant this court in a reversal of the case below, it is not necessary for this court to consider the other assignments of error.

The judgment therefore is reversed and cause remanded for a new trial.

Judge McFie, being of counsel for defendant in the trial court, did not sit in this case.

Mills, C. J., Crumpacker and Parker, JJ., concur.

[No. 803. September 2, 1898.]

TERRITORY OF NEW MEXICO, Appellee, v. TOMAS
ARCHIBEQUE and ALBERTO CEVADO,
Appellants.

CRIMINAL LAW—APPEAL—ASSIGNMENTS—PROCEDURE.—1. Alleged errors occurring at the trial in criminal cases must be called to the attention of this court by motion for a new trial, exception to the overruling of the motion must be saved and the motion and exception made a part of the record by bill of exceptions before this court will consider them.

2. The code of civil procedure does not control the requirements as to appeals in criminal cases.

Appeal, from a judgment convicting defendants of arson, from the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

HORTON MOORE for appellants.

The accused has a right to a full box at all times when exercising his peremptory challenges. Territory v. Sumner,

46 Pac. 16; Territory v. Barrett, 8 N. M. 70; Shelby v. Com., 16 S. W. Rep. 461. See, also, Comp. Law 1897, sec. 3404; People v. McQuade, 18 N. E. Rep. 156; Jenkins v. Com., 4 S. W. Rep. (Ky.) 816; Wilson v. Com., 4 Id. 818; Shelby v. Com., supra; Mundy v. Com., 81 Ky. 233, decided prior to provision of code; Edington v. Com., — Ky. App. —; Mickey v. Com., 9 Bush. (Ky.) 595; Railway Co. v. Mitchell, 45 S. W. Rep. 819.

The burden of proof can never shift to a defendant in a criminal case. Whar. Crim. Ev. [9 Ed.], secs. 330, 332, 431; Turner v. State, 86 Pa. St. 54; Watson v. Com., 95 Id. 418; Whar. Crim. Ev. [9 Ed.] 333; Davis v. State, 5 Box (Tenn.) 612; Wiley v. State, Id. 662; State v. Jaynes, 78 N. C. 504; Howard v. State, 50 Ind. 190.

EDWARD L. BARTLETT, solicitor general, for the territory.

There is no motion for new trial in the bill of exceptions, and the questions as to errors committed by the trial court in impaneling the jury can not be considered here. Territory v. Chavez, 50 Pac. Rep. 324.

In regard to the question of proof of alibi see: Borrego v. Territory, 8 N. M. 474; Trujillo v. Territory, 7 Id. 44. See, also, Walker v. State, 42 Tex. 376; State v. Davis, 53 Pac. Rep. 681.

PARKER, J.—The defendants, Tomas Archibeque and Alberto Cevada, were jointly indicted, tried and convicted of the crime of arson in the district court of Bernalillo county and sentenced to a term of five years in the territorial penitentiary. They bring the cause here by appeal. The bill of exceptions contains no motion for a new trial.

This case falls within the rule laid down in Territory v. Chavez y Chavez, 50 Pac. 324, where it is held in accordance with the former decisions of this court, that errors occurring at the trial must be called to the attention of the court by motion for a new trial, and exception must be saved to the overruling of the

CRIMINAL law:
appeals: assign-
ment.

motion, and the motion must be made part of the record by bill of exceptions. We see no reason to depart from this rule.

2. It was urged by counsel for appellants that this appeal having been taken since the code of civil procedure went into effect, matters are thereby made a part of the record, not

PROCEDURE. made so under former practice except by bill of exceptions; but we decide that the code of civil procedure is not applicable to and does not govern as to the requirements in appeals in criminal cases. There being no error in the record proper, the judgment below is affirmed.

McFie, Leland, JJ., and Mills, C. J., concur; Crumpacker, J., did not sit in this case having presided at the trial below.

[No. 730. September 2, 1898.]

W. A. GIVENS, Appellee, v. JOHN D. W. VEEDER,
Appellant.

SYLLABUS BY THE COURT.

COSTS—PRINTING TRANSCRIPT—STENOGRAPHER'S FEES.—Costs for printing transcript of record, on appeal to this court, are improperly taxed as costs when the amount in controversy does not exceed \$1,000, such printing being purely voluntary and an unnecessary expense.

2. The charges of a stenographer used by a master in chancery, in the absence of stipulation or agreement, can not be taxed as costs; the court having ordered the master to take the proofs and it being presumed that the master's allowance was made to cover all such services.

Appeal, from Second Judicial District Court, Bernalillo County. Motion for retaxation of costs. Granted.

JOHNSTON & FINICAL and A. B. McMILLEN for appellee.

VEEDER & VEEDER for appellant.

MILLS, C. J.—This case was heard in the supreme court of this territory at the July term, 1897, and judgment was

given for the appellant. On January 15, 1898, a cost bill was issued by the clerk of this court, against Givens, amounting in all to the sum of \$508.70. On January 21, 1898, shortly after the judgment of the supreme court, the appellee filed a motion to retax costs, claiming, first, that the item of \$55.50 for stenographer constituted no part of the costs, for the reason that the allowance made by the court below for the fee of the master necessarily included any expense he may have incurred for a typewriter in this cause; and, second, that the item of \$206 for printing transcript, besides being charged at a rate double that allowed by law where the printing of a transcript forms a part of the costs, can not form a part of the costs in this case, for the reason that the amount involved is less than a thousand dollars, and the printing of the transcript is not required by law and is wholly voluntary, and no charge therefor is allowed by law.

For some reason which does not appear, and in vacation, shortly after the filing of the above motion, the clerk made out a new cost bill, omitting the item of stenographer's fees, \$55.50, and reducing the item of printing transcript from \$206 to \$123 and adding the costs in the supreme court, some \$22.85 for some reason were omitted from the former taxation and on January 31, 1898, issued execution, the costs being taxed at \$394.05.

The claim of the appellee is that the only matter now before us is the item of \$123 taxed by the clerk for the printing of the transcript, while counsel for appellant contends that the whole matter of costs was either settled by the clerk at the

second taxation or that the whole is now before us, as the motion for taxation filed has never been acted upon by the court, and because the change made by striking out items was made by the clerk of his own volition, or by some judge personally in vacation, and not acting in his official capacity, and that the same is consequently not binding as an act of this court, being coram non judice.

COSTS: printing
transcript.

We regard this claim of the appellant as the correct one. If both parties were satisfied with the action of the clerk, the motion to retax could be stricken from the docket on motion, and nothing would now be before us; but as the appellee is dissatisfied and desires to proceed with the hearing, the whole matter of the taxation must come up. Counsel for the appellee can not contend that the action of the clerk in his second taxation was final as to what helped him, and yet not so as to the single item of costs of \$123 for printing which they now claim is incorrect.

We will consequently consider the whole matter of the disputed items.

Section 3147 of the Compiled Laws, so far as it applies to civil cases, reads:

“In civil cases removed into said supreme court for review, appellants, or plaintiffs in error, shall not be required to print the record, nor any part thereof, unless the amount of the judgment to be reviewed or the value of the property in dispute shall exceed one thousand dollars, exclusive of costs.”

Does the judgment in question come under the provisions of this act, as being for less than \$1,000? Our court follows the same rule as the supreme court of the United States, and that court holds that the amount of the judgment with interest thereon to the time of the rendition of the judgment of the court from which the appeal is taken (*Steamship Co. v. Merchant*, 133 U. S. 375), but excluding costs, determined the jurisdiction. The judgment in this case was given January 30, 1897, and was for the sum of \$918.50, carrying interest at the rate of twelve per cent per annum from the date of its rendition; consequently that amount determines the jurisdiction. There is no question brought as to the value of the property giving jurisdiction; no affidavit was filed showing that the value of the property in dispute was over a thousand dollars. The appellant had collected a life insurance policy on the life of one Calvin Fisk, for the sum of \$5,000 and presumably had all the money in his possession, but Givens only obtained judgment for \$918.50, and after such judgment that

amount with interest was all that he claimed from Veeder. And as the money was separable and divisible the amount above that sum was not in question. We hold that the amount in controversy in this case is below the \$1,000 limit.

As to the stenographer's fees of \$55.50, they arose for work done by the stenographer in taking the evidence before the master in chancery. On July 27, 1895, the court appointed a special master to take the testimony in said cause and reported the same, stating his findings of fact and conclusions of law thereon. The record shows that the master was paid \$150 for his services in this case, and this presumably covers what he was compelled to pay the stenographer to take down the testimony and transcribe the same. It will be noticed that the order appointing him specified that he should take the testimony in said cause, not that he should hire any one else to do it. Doubtless, in making the allowance to the master, the court considered what he would have to pay out for a stenographer if it was necessary to employ one. In the case of *Brodges against Sheldon*, 18 Blatchf. 501, the court says:

“There is also a question about the charges of a stenographer being a part of the costs. A stenographer was engaged by the parties to take down the oral testimony of witnesses, upon the accounting before the master. The master has certified that this was done by his procurement as master, and that the charges should be taxed as costs of the accounting. It does not appear that the parties agreed that these charges should be taxed as costs of the accounting. It does not appear that the parties agreed that these charges should be so taxed. Whether they can be or not depends upon the authority of the master to make such charges taxable. The master has, under the equity rules, very large discretion about the production of testimony and the order of examination of witnesses and of procedure before him, but these charges are not made taxable fees or costs by either the statutes or rules and the question is whether the master can make such charges taxable when the law has not made them

COSTS: stenographer's fees.

so. The court can not employ a stenographer at the expense of the government, neither could it at the expense of parties without their consent, not allow one to do so at the expense of another by requiring the expense to be treated as taxable costs. The authority of the master can not exceed that of the court appointing the master. These charges are left to be borne by the parties according to their contract without being taxed."

The charges for stenographer used by the master can not therefore be taxed.

As to the printing of the record we do not regard it as a taxable charge, there is no law compelling the printing of a transcript involving less than \$1,000, and if printing is done in such cases it is voluntary and is an unnecessary expense, and no court will tax costs for unnecessary expenses, unless required to do so by an affirmative provision of law. In both of the taxations appear items for printing transcripts, in the first \$206, and in the second \$123. This printing was useless and should be disallowed. *Wilson v. Railroad*, 57 Mich. 155; *Parsonette v. Johnson*, 40 N. J. Eq. 32; *Crippen v. Brown*, 11 Paige (N. Y.), 628; *Spary v. Robinson*, 24 W. Va. 527; *Hussy v. Bradly*, 5 Blatchf. 210.

We are of the opinion that the motion of the appellee should be granted, and the items complained of in the motion should not be taxed as costs, and it is so ordered.

Crumpacker, McFie, Leland and Parker, JJ., concur.

[No. 767. September 2, 1898.]

FRANK W. CROSS, Plaintiff in Error, v. BOARD OF
COUNTY COMMISSIONERS OF GRANT
COUNTY, Defendant in Error.

SYLLABUS BY THE COURT.

COUNTY WARRANTS--LIMITATION. It is not error for the court below to sustain a demurrer, setting up statute of limitations to a complaint declaring upon a county warrant where it appears that nearly nine years have elapsed between the date of the issuance of the warrant and the institution of this action, and there is no allegation in explanation of the reason for the long delay in presenting it for payment, and there was no offer to amend.

Error, from a judgment for defendant, to the Third Judicial District Court, Grant County. Affirmed.

The facts are stated in the opinion of the court.

CHARLES A. SPIESS and R. P. BARNES for plaintiff in error.

The warrant fixes no time when it is payable, but like a promissory note which contains nothing as to the time of its maturity, is payable on demand. Libley v. Nickelborg, 28 Minn. 38; Salinas v. Wright, 11 Tex. 572; Bank v. Price, 52 Ia. 570; Meador v. Savings Bank, 50 Ga. 604.

Analogous to demand notes, as to the drawer or maker, the bringing of the suit is a sufficient demand. Bell v. Salkett, 38 Cal. 407; Collins v. Trotter, 81 Mo. 275; Middleton v. Bostin, etc., 26 Pa. St. 257.

The cause of action on a county warrant does not accrue until a demand for its payment has been made. Schloss v. Board Co. Comm'rs, 28 Pac. Rep. 18. See, also, Packard v. Bovina, 24 Wis. 382; Bank v. Franklin Co., 65 Mo. 105; Terry v. Milwaukee, 15 Wis. 490; Campbell v. Polk County, 3 Ia. 467;

Bank v. Mills County, 67 Id. 697; Savage v. Supervisors, 10 Wis. 49.

The cause of action upon a county warrant does not accrue when it is presented for payment and indorsed "Not paid for want of funds," but "when the money for its payment has been collected," or "when sufficient time has elapsed for the collection of the money;" and "two years" can not be said to be "sufficient time" to cause the statute of limitations to begin to run. King J. B. & Mfg. Co. v. Otoe County, 124 U. S. 514; Brewer v. Otoe County, 1 Neb. 373.

T. S. HEFLIN, district attorney, for defendant in error.

CRUMPACKER, J.—On the tenth day of May, 1897, the plaintiff in error commenced an action in assumpsit against the board of county commissioners of Grant county, the defendant in error. The action was commenced on a county warrant which had been issued by the commissioners of Grant county to one A. B. Laird for the sum of \$1,246.24, who, for value, assigned the same to plaintiff in error.

The declaration contains three paragraphs, the first alleging upon the common counts, the second upon the assignment of the account, and the third and material paragraph is as follows:

"And for another further cause of action, plaintiff alleges that defendant on, to wit, the eleventh day of April, A. D. 1888, at, to wit, the county of Grant aforesaid, was justly indebted to Andrew B. Laird and then and there, to wit, on the day and year last aforesaid, at, to wit, the county of Grant, aforesaid, accounted with the said Andrew B. Laird of and concerning divers large sums of money before that time due to him as aforesaid, and upon such accounting defendant was then and there found to be in arrear and indebted to the said Andrew B. Laird, in the sum of twelve hundred and forty-six dollars and twenty-four cents, lawful money of the United States of America, and being so indebted, said defendant did then and there, to wit, on the day and year last aforesaid,

make, execute and deliver to the said Andrew B. Laird, in consideration of the indebtedness of defendant found upon said accounting as aforesaid, a certain warrant and certificate of indebtedness of defendant, in words and figures following to wit:

"No. 3 B. County Commissioners' Office, Silver City, N.M.

April 11, 1888.

To the Treasurer of Grant County, New Mexico:

Pay to A. B. Laird or order, twelve hundred and forty-six 24-100 dollars, out of Special Cash Funds in the County Treasury, not otherwise appropriated.

T. W. Cobb,

Chairman of Board of County Commissioners.

(County Seal.)

A. H. Morehead,

Probate Clerk and Ex-officio Clerk of Board.

"Said warrant and certificate of indebtedness being indorsed across the face thereof with the following words, to wit, 'Feeding prisoners, etc.,' and said warrant and certificate of indebtedness being indorsed across the back thereof, with the following words and figures, to wit: 'A. B. Laird, E. A. Baker, presented but not refunded March 21, 1889, A. H. Morehead, Clerk of Board,' and being so found in arrears and indebted by reason of the execution and delivery as aforesaid of its warrant and certificate of indebtedness, in consideration thereof, the said defendant, on to wit, the day and year first aforesaid, at, to wit, the county of Grant aforesaid undertook and then and there promised to pay to the said Andrew B. Laird the said sum of \$1,246.24 when it, the said defendant, should be thereunto afterwards requested and plaintiff alleges that afterwards, to wit, on the day and year first aforesaid, at, to wit, the county of Grant aforesaid, the said Andrew B. Laird for value received assigned, transferred and delivered the said warrant and certificate of indebtedness aforesaid to plaintiff, and that in consideration of the indebtedness aforesaid of defendant to said Andrew B. Laird and of the making, execution and delivery of the said warrant and certificate of

indebtedness aforesaid to said Andrew B. Laird, and of the assignment and delivery of said warrant and certificate of indebtedness by said Andrew B. Laird to plaintiff as aforesaid, defendant then and there, to wit, on the day and year in this county aforesaid, to pay to plaintiff the said sum of money in this count mentioned when it, said defendant, should be thereunto afterwards requested, yet, said defendant, not regarding its said several promises and undertakings in this behalf hath not as yet paid the said sum of money in this count mentioned or any part thereof to plaintiff; said defendant hath wholly neglected and refused and still doth neglect and refuse, to wit, at the county of Grant, aforesaid, to the damage of plaintiff twenty-five hundred dollars."

The defendant in error demurred, setting up that the declaration upon its face showed that the cause of action therein had not accrued within six years next before the commencement of the action. The court sustained the demurrer and entered final judgment dismissing the cause. The third paragraph is relied upon in the arguments in the brief.

The assignments of error are each based upon this action of the trial court in sustaining the demurrer, etc.

The record in the case presents but one question: Was the recovery upon a county warrant barred by section 2915 of the Compiled Laws of New Mexico of 1897, which provides "that actions founded on any bond, promissory note, bill of exchange or other contract in writing may be brought within six years after the cause of action thereon accrued, and not afterwards."

COUNTY warrants:
limitation.

The warrant in this particular case was drawn on April 11, 1888, for the sum of \$1,246.24, upon the treasurer of Grant county payable "out of special cash funds in the county treasury, not otherwise appropriated." Thereafter the warrant was presented to the county commissioners for the purpose of exchanging it for bonds, and to fund which was optional with the county commissioners. Upon the refusal of the county commissioners to so fund it, the warrant was

indorsed as required by the statute, by the probate clerk, "presented but not refunded, March 21, 1889, A. H. Morehead, clerk of the board" and stood for payment in its regular order of issue. Certainly if this presentment of the warrant for funding may be considered as a demand of payment, and the indorsement as a refusal of payment, the cause of action accrued more than eight years before the bringing of this action on May 10, 1897; but plaintiff in error contends that the warrant being drawn on the treasurer, the presentment to the commissioners for exchange in bonds was not a presentment for payment at all, and the refusal to fund not an absolute refusal to pay, and that no demand for payment having been made prior to the commencement this action, which it is alleged is in itself a sufficient demand and presentment, the statute did not begin to run until the institution of this suit, and that therefore the right of action is not barred. We can not adopt this construction of the law. It is universally understood that the chairman of the board of county commissioners who draws the county warrants has not the funds of the county in hand, but as evidenced in this cause by the warrant itself they are in possession of the treasurer. Any creditor of the county who received such warrant (against which indeed the county could set up any defense it had against the original holder even in the hands of a subsequent holder) must be considered as understanding these facts and as assenting to this mode of payment, and by accepting the warrant he is under an implied engagement to conform to established usage and present the warrant to the treasurer. Good faith requires him to do this, and the law considers him as promising so to do. If on presenting the warrant payment be refused, the county which draws the warrant is answerable instant. But there can be no good reason given why the county, which is not bound to seek its creditors, should be subjected to the perplexity and costs of an action before the payee of a warrant will give himself the trouble to do his duty and request payment of the money due him according to the terms of it. Here, it appearing on the face of the declaration

that nine years had elapsed between the date of the warrant and the commencement of this action, with no allegation in explanation for the reason of the delay in instituting the action, the county properly pleaded the statute of limitations, and the plaintiff, having failed to move to amend to allege such facts as would avoid the statute, must in view of the rule of law that all presumptions are against the pleader be deemed to have been unable to set up such facts as would avoid the bar, and in the absence of any allegation to the contrary this court will presume that the county commissioners performed their duties and that under the revenue laws they had levied and collected, during at least the three years preceding the six year period of the statute of limitations which elapsed between the presentment of the warrant for funding and the institution of the action, sufficient revenue to pay all the matured just debts of the county. All the cases cited by counsel for plaintiff in error in support of their contention depend upon an allegation that payment was demanded and refused, the refusal being within the statutory period, and the case of *King Iron Bridge & Mfg. Co. v. Otoe County*, decided by the supreme court of the United States under statute very similar to ours, may be distinguished from this case in that the plaintiff there alleged presentment, demand and refusal to pay for want of funds, and neglect and failure from the date of the demand made within the statutory period until the time of the commencement of the action to levy a tax to provide for the payment of the same. See *Thompson v. Searcey Co.*, 57 Fed. 1030.

From the pleadings in this case we are therefore unable to say that the statute of limitations has not run against the complaint. We must affirm the judgment of the court below, and it is so ordered.

Leland, A. J.; Mills, C. J.; Parker and McFie, JJ., concur.

[No. 768. September 2, 1898.]

WILLIAM H. MILLER, Plaintiff in Error, v. CITY OF SOCORRO, Defendant; JOHN McCUTCHEN and J. M. HILL, Interveners, Defendants in Error.

SYLLABUS BY THE COURT.

MUNICIPAL CORPORATIONS—WARRANTS—ACTION—INTERVENTION—LIMITATION.—1. A tax payer may be granted leave to intervene in an appeal taken under section 289 of the Compiled Laws of New Mexico, 1897, by a claimant feeling aggrieved by the action of the city council.

2. It is not error for the court to enter judgment against plaintiff, a plea of the statute of limitations having been interposed, on a petition to fund city warrants, where there is nothing in the record in explanation of the long delay of ten years or more, extending from the date of the city's indorsement upon the warrants of "not paid for want of funds" to the date of bringing suit, in instituting the action.

Error, from a judgment for defendants, to the Fifth Judicial District Court, Socorro County. Affirmed.

The facts are stated in the opinion of the court.

W. E. KELLY for respondent in error.

To authorize the right of intervention under sections 2947, 2948, 2949, Comp. Laws 1897, the interest of the intervener must be such that he would directly gain or lose by the result of the action. *Smith v. Gale*, 144 U. S. [Law Ed.] 524, 525.

Interveners take the suit as they find it, and can not urge matters that would go to the dismissal of the suit, nor complain of the mode of procedure; nor can they create defenses for the defendant. *American Dig.* 1891, p. 3395, note 69; *Cohn v. Ford*, 8 So. Rep. (La.) 477; *Miller v. Railway Co.*, 55 Fed. Rep. 371; *American Dig.* 1891, p. 3395; *Smith v. Gale*, *supra*.

A municipal corporation can not avail itself of the plea of the statute of limitations until it has complied with all

the conditions and requirements of the statute creating it. 15 Am. and Eng. Ency. of Law 1308; Am. Ann'l Dig. 1892, pp. 3215, 3216; Moore v. Waco, 20 S. W. Rep. (Tex.) 61; King I. B. & Mfg. Co. v. County of Otoe, 124 U. S. [Law Ed.] 514; Morton v. Knok & Co., 65 Fed. Rep. 369; Logan v. Barton Co. Court, 63 Mo. 349; County of Lincoln v. Luning, 133 U. S. [Law Ed.] 766. See, also, Shannon v. Huron, 69 N. W. Rep. 598; Underhill v. Sonora, 17 Cal. 172; Freehill v. Chamberlain, 65 Id. 603.

The statute of limitations does not begin to run until payment is refused. 15 Am. and Eng. Ency. of Law 1222; Bibb Co. Court v. Orr, 12 Ga. 137; Clark v. Iowa City, 20 Wall. 583; Carroll v. Tishomingo, 28 Miss. 38; De Cordova v. Galveston, 4 Tex. 470; Brewer v. County of Otoe, 1 Neb. 373; Logan v. Barton Co. Court, 63 Mo. 336; Praitt v. Durant, 19 S. W. Rep. (Tex.) 281. See, also, 1 Dill. on Munic. Corp., secs. 487, 503, 504, and citations.

The city of Socorro has not pleaded the statute of limitations which is a personal privilege of the debtor only, and the interveners can in no manner do so for it. 13 Am. and Eng. Ency. Law, 706; Miller v. Street R'y Co., 55 Fed. Rep. 371.

County and city warrants, or orders signed by the proper officers, are prima facie binding and legal. 15 Am. and Eng. Ency. of Law (O. S.) 1222; 1 Dill. on Munic. Corp., sec. 502, and citations in note 1.

H. M. DOUGHERTY for defendants in error.

All taxpayers are, by statute, expressly made parties in interest, even to the extent of permitting them to appeal. Comp. Laws 1897, sec. 286.

One who has sufficient interest to appeal has sufficient interest to intervene. The interest being established, it is then for the court to say under what conditions he can be heard. Comp. Laws 1897, secs. 2947, 2948, 2949.

Interventions are within the discretion of the court. Smith v. Gale, 144 U. S. 524, 525; Hart v. Kohn, 33 N. Y.

372. See, also, 3 Estes, Pl., sec. 16, note 27; Coborn v. Smart, 53 Cal. 742; Owens v. Collier, 97 Id. 454; Barns v. Babcock, 104 Id. 1.

Without special provision of the statute, the statute of limitations runs both for and against cities and counties the same as individuals. Wood on Lim. 753; Cincinnati v. Evans, 5 Ohio St. 594; St. Charles Co. v. Powell, 22 Mo. 525; Cincinnati v. First Presby. Church, 8 Ohio St. 298; 13 Am. and Eng. Ency. of Law 714; Evans v. Erie Co., 66 Pa. St. 222. See, also, Comp. Laws 1897, sec. 2932; Dill. on Munic. Corp. 406, 407, 412; Jerome v. Rio Grande Co., 18 Fed. Rep. 873; Agua Chita Co. v. Wood, 103 U. S. 559; Wall v. Monroe Co., Id. 574; Thomas v. City of Richmond, 12 Wall. 252.

As to time when statute of limitations begins to run see: 1 Wood on Lim. 56; 4 Am. and Eng. Ency. of Law 363; Dill. on Munic. Corp., sec. 411 [Ed. 1873]; also, Baker v. Johnson, 33 Ia. 151; Terry v. Milwaukee, 15 Wis. 543; Bank v. Franklin Co., 65 Mo. 105; Campbell v. Polk Co., 3 Ia. 467; Parkard v. Town of Browne, 24 Wis. 382; Savage v. Supervisors, 10 Id. 44; Schloss v. County Commr's, 28 Pac. Rep. (Colo.) 18.

CRUMPACKER, J.—The facts in this case show that plaintiff in error, William Hezekiah Miller, appealed to the district court having jurisdiction from the action of the city council of the city of Socorro, New Mexico, in refusing to fund warrants therefore issued by city and unpaid. The appeal is under the authority of section 286, Compiled Laws of 1897. In September following the city entered its appearance to the action. On September 10, 1897, the city council appears to have reconsidered the alleged indebtedness involved in this appeal, and on recommendation of its committee appointed to investigate in regard to the pending suit ordered that the claim should be recognized and the warrants funded as provided by law. On September 13, 1897, defendants in error petitioned the district court for leave to intervene as taxpayers. The court granted the leave on interveners amending

their petition by setting up reasons why they seek to intervene and by giving reasons why the city will not properly defend, etc. From this amended petition it appears that the original disallowance of the claim on which appeal was based was for irregularities and fraud in the issuance of the warrants, that the meeting of the council of the city of Socorro held on September 10 was illegal, and that the council attempted with fraudulent intent to impose an unjust debt upon the city of Socorro in total disregard of the rights of taxpayers and interveners and that they fraudulently failed and neglected to interpose a proper and legal defense to the controversy involved in the appeal. On being admitted to defend, the defendants in error interposed the plea of the statute of limitations. Plaintiff in error moved to strike out amended petition and plea, which motion was overruled. Thereupon plaintiff replied to defendants' plea and joined issue upon the statute of limitation and upon trial the court rendered judgment against plaintiff in error. Motion to vacate judgment was overruled and the plaintiff in error brings the record into this court on a writ of error.

The assignments of error are as follows:

1. The court erred in overruling the plaintiff's demurrer to interveners' amended petition of intervention.

2. The court erred in overruling the plaintiff's demurrer to interveners' plea of the statute of limitations.

3. The court erred in finding that the statute of limitations applied to municipal or city warrants or orders, which are the basis of this action.

4. The court erred in sustaining the plea of the statute of limitation plead by the interveners when the same was not the plea of the defendant city of Socorro.

The first important question in this case is as to the right of defendants in error to intervene in an appeal taken under section 286 of the Compiled Laws of 1897 by one aggrieved by the action of the city of Socorro. Under sub-section 5 of section 2685, Compiled Laws, New Mexico 1897, it is clear

WARRANTS:
action: interven-
tion.

that one having or even claiming an interest in a matter in litigation may be made a defendant, and by section 286 thereof, the statute on which the plaintiff bases his appeal, any taxpayer as well as a claimant is specially granted the right of appeal to the district court. Under sections 2947, 2948, 2949, "Any person who has an interest in the matter in litigation in the success of either of the parties to the action or against both, may become a party to an action between other persons, either by joining plaintiff in claiming what is sought by the declaration, or by uniting with the defendant in resisting the claim of plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the cause and before the trial commences." The plaintiff in error, not having made these interveners defendants and they being real parties in interest, under the statute cited, they may be permitted to intervene, which obviates the necessity of other vexatious and expensive appeals where the controversy can be entirely litigated under the original appeal. Therefore we can not escape the conclusion that defendants in error had the right to intervene.

Finding no error in the action of the court in permitting the intervention, we must determine whether defendants in error under their plea of the statute of limitations could bar a recovery by plaintiff in error in this action. Having seen that interveners' interest is a lawful one, it follows that they had a right to interpose the defense of the statute of limitations to the action. It appearing from the record in this case that all the warrants involved in this claim were issued and presented for payment, and indorsed "Not paid for want of funds" prior to the year 1887, we think the reasoning in the case of Cross v. Board of County Commissioners, decided at this term has application here. Had the city of Socorro on presentment of the warrants then absolutely refused to pay the same, there can be no doubt that the cause of action accrued on the date of such refusal, and the city would have been liable instantly. But from the

INTERVENTION:
limitation

record in this case it appears the court found that the refusal was based on the "want of funds." The plaintiff in error has not set up in his petition for appeal nor in his reply to interveners' plea any facts in explanation of this long delay of ten years or more since the date of the city's indorsement upon the warrants of not paid for want of funds, and this court will presume, no allegation to the contrary appearing, that the finances of the city were on such basis that during at least some time in the four years preceding the six year period of the statute of limitations, which elapsed between the indorsement on the warrants by the city and the bringing of this action, the city had funds to pay these warrants, and a municipal corporation not being such a debtor as is charged by law to seek its creditor, it was incumbent upon the plaintiff in error to set up sufficient facts to overcome the presumption that had these warrants been presented for payment within the time mentioned, they would have been paid.

We can discover no error on the part of the court below in entering judgment against the plaintiff in error on his petition to fund the warrants here involved, and the case is therefore affirmed.

Mills, C. J.; Leland, Parker and McFie, JJ., concur.

[No. 775. September 2, 1898.]

JOHN W. SCHOFIELD, Receiver, Plaintiff in Error, v.
WILLIAM B. SLAUGHTER, Defendant in Error.

JOSEPH E. SAINT, Receiver, v. WILLIAM B. SLAUGHTER.
JOHN W. SCHOFIELD, Receiver, etc.,
v. WILLIAM B. SLAUGHTER et al.

SYLLABUS BY THE COURT.

TRIAL BY JURY—ERROR—MOTION FOR NEW TRIAL—REVIEW.—1. Where a motion for a new trial was not made within five days, as provided in section 2685, sub-section 133, Compiled Laws of 1897, errors alleged to have been committed by the court below will not be reviewed.

2. Where a jury is impaneled and evidence taken before it on the trial of a cause, it is a jury trial within the meaning of section 2685, sub-section 133, Compiled Laws of 1897 though the jury rendered its verdict by direction of the court.

Error, from a judgment for defendant, to the Fifth Judicial District Court, Socorro County. Affirmed.

The facts are stated in the opinion of the court.

CHILDERS & DOBSON for plaintiff in error.

If the debtor is not an inhabitant of the territory and has no place of abode at which summons may be lawfully served, he may be proceeded against by attachment. Wap. on Att. 36, 27; Monroe v. Williams, 16 S. E. Rep. 533; Frost v. Brisbin, 19 Wend. 11; Haggard v. Morgan, 5 N. Y. 422; Drake on Att., sec. 69. See, also, as to distinction between "residence" and domicile" or "citizen," Drake on Att., sec. 58; 2 Kent's Com. 576, note; Wade on Att., secs. 75, 76; 32 Am. Dec. 427, note; Adams v. Abernathy, 37 Mo. 196; Chariton Co. v. Moberly, 58 Id. 238; Green v. Beckwith, 38 Id. 384; Hanson v. Graham, 23 Pac. Rep. 56; Keller v. Carr, 40 Minn. 428; Bank v. Stebbins, 69 Hun. 308; Bowers

v. Ross, 55 Miss. 213; Brown v. Crane, 69 Id. 678; Dorsey v. Kyle, 30 Md. 572; Long v. Ryan, 30 Gratt. (Va.) 720; Baldwin v. Flagg, 43 N. J. Law. 495.

It is the duty of the court to direct a verdict only when the evidence is undisputed, or is so conclusive that a verdict in opposition thereto would be set aside. Richardson v. Boston, 19 How. 263; Canal Co. v. Knapp, 9 Pet. 541; Hogan v. Page, 2 Wall. 605.

Where the intention with which an act is done becomes a subject of inquiry, it belongs exclusively to the jury to decide. Lee v. Lee, 8 Pet. (U. S.) 50; U. S. v. Quincy, 6 Id. 466; Cornett v. Williams, 20 Wall. 244.

WARREN, FERGUSSON & GILLET and B. F. DEATHERAGE
for defendant in error.

We submit that, in law, there was no motion for new trial of this cause filed in the court below, because there is no motion for new trial incorporated in the bill of exceptions filed in the cause. Assurance Co. v. Walker, not reported; Rogers v. Richards, 8 N. M. 663. See, also, Territory v. Anderson, 4 N. M. 228; Territory v. Chavez, 8 Id. 528; Buettinger v. Hurley, 34 Kan. 585; Arnold v. Boyer, 108 Mo. 310; Games v. Sumners, 39 Ark. 482; Bowman v. Ely, 135 Ind. 494; Wolcott v. Bachman, 23 Pac. Rep. 72, 673; White v. Blair, 95 Ala. 147; 10 Soth. Rep. 257; Causy v. Miller, 17 Ga. 435; Kaufman v. Farley Mfg. Co., 78 Ia. 670; Harper v. Harper, 73 Ky. 451; Nettles v. Scott, 17 La. 336.

In a case like this it is the duty of the court to instruct a verdict for the defendant. 2 Thomp. Tr., sec. 2242; Chandler v. Van Roeder, 24 How. 227; Wilder v. Wheeldon, 56 Vt. 344; Harris v. Woody, 9 Mo. 113; St. Johnsbury v. Thompson, 9 Atl. 571. See, also, 2 Thomp. Tr., sec. 2245; Tyson v. Yawn, 15 Ga. 491; Boland v. Railroad, 36 Mo. 484; Meyer v. Railroad, 40 Id. 151; Charles v. Patch, 87 Id. 450, 462; Alexander v. Mining Co., 3 N. M. 255; Lockhart v. Wills, 50 Pac. (N. M.) 318; Ellis v. Railway Co., 150 U. S.

245; Railroad Co. v. Houston, 95 Id. 697; Schofield v. Railroad, 114 Id. 615; Railroad v. Converse, 139 Id. 469; Hildebrand v. Lillis, 51 Pac. Rep. 1008; Bank v. Insurance Co., 105 U. S. 783; Richardson v. Boston, 19 How. 263.

The question of residence is generally a question of intention. Shinn on Attach. 149; Green v. Beckwith, 30 Mo. 384; 1 Am. and Eng. Ency. of Law, 897; 6 Drake on Attach., secs. 57, 63; 6 Am. and Eng. Ency. of Law 279; Wap. on Attach. 42, 46; 1 Whar. Ev. [2 Ed.], secs. 482, 508.

McFIE, J.—The above causes were suits in assumpsit by attachment, commenced in the district court of Bernalillo county, on the sixth day of March, A. D., 1894.

Issue was joined by a traverse of the attachment, and upon that issue, the causes having been consolidated by stipulation of counsel, trial was had at the December term, 1897, and a verdict was rendered by direction of the court in favor of the defendant on the eighth day of January, 1898.

On the eighteenth day of January, 1898, motion for a new trial was filed by the plaintiff, and the same was overruled, and by consent of the defendant, judgment was rendered in favor of the plaintiff for the amount due in each of said causes, January 20, 1898.

A writ of error was sued out by the plaintiff in the court below, and the defendant in error has filed a motion to dismiss the writ of error.

The motion for new trial in this cause was filed ten days after the trial was had in the lower court, and the verdict rendered, and the motion to dismiss the writ of

ERROR: motion for
new trial: re-
view.

error is made upon the ground that the motion was not filed within the time required by law, and that the same was not incorporated in the bill of exceptions so as to become a part of the record in this case. The motion for new trial was filed on the eighteenth day of January, 1898, and is therefore governed by section 2685, sub-section 133, Compiled Laws of 1897, which is in part as follows:

“All motions for new trials in cases tried by juries shall be filed during the term of the court at which the case is tried, and within five days after the rendition of the verdict or findings.”

The language of this section is unambiguous, and requires motions for new trials to be filed within five days after the rendition of the verdict.

It is clear that the motion for new trial was not filed within the time specified in the statute.

This court has repeatedly held that a motion for a new trial must be made in the court below, and in the event this is not done, this court will not review the action of the lower court on writ of error. *Rogers v. Richards*, 8 N. M. 663; *Territory v. Anderson*, 4 N. M. 228; *Speigelberg v. Mink*, 1 N. M. 308; *Sierra Co. v. Dona Ana Co.*, 5 N. M. 190; *Territory v. Chavez*, 50 Pac. Rep. 324.

The cases above cited are decisive of this case as to the necessity for filing a motion for a new trial.

But it is insisted by the plaintiff in error that in a case where the court directs a verdict it is not a jury trial, and therefore the law as above laid down applicable to trials by jury, has no application to a trial by jury where the verdict is rendered by direction of the court. We are unable to ac-

cept this view of the law. In the case of
JURY trial. *Spiegelberg v. Mink*, 1 N. M. 308, this court

held that a motion for a new trial was necessary not only where the case is tried by the jury, but also where the jury is waived and it is tried by the court; and the statute above referred to evidently means the same thing when it requires motions for new trial to be filed within five days after the rendition of the verdict or findings. Where, however, a jury is impaneled, and evidence is taken before the jury, it is a jury trial whether a verdict is directed by the court or not.

Prior to the enactment of section 2685, sub-section 133, Comp. Laws of 1897, the rules of this court, required motions for a new trial to be filed within five days; and in the case of

Rogers v. Richards, above referred to, the rules of this court are declared to have the force of a statute.

It appears from the record in this case that although the motion for a new trial was not filed within the time required by the statute, the same was acted upon by the court, although the record further discloses, that the only evidence of notice to opposing counsel is a letter dated the twenty-second day of January, 1898. The motion was disposed of by the court on the twentieth day of January, two days prior to the date of the notice to opposing counsel.

The motion for a new trial in this case was not filed within the time required by the statute, and the statute must govern as it is too plain to admit of construction. The fact that the court saw fit to pass upon the motion does not change the matter in any respect. The court's action can not have the effect modifying the provisions of the statute, and it is immaterial what action the court may have taken upon the motion.

The motion to dismiss the writ of error will be overruled, as the record proper can not be stricken out, but as there is no reversible error in the record, the judgment of the court below will be affirmed with costs.

Mills, C. J.; Crumpacker, Leland and Parker, JJ., concur.

[No. 793. September 2, 1898.]

WILLIAM H. BYERTS, Appellant, v. NANCY J. ROBINSON, Administratrix, Etc., Appellee.

SYLLABUS BY THE COURT.

PROMISSORY NOTE—EVIDENCE—PAYMENT—BURDEN OF PROOF.—1. Books of original entry can not be used as evidence unless the statutory requirements regarding their admissibility are first complied with.

2. The statutory provisions in this regard amend the common law rule.

3. The memorandum of sale was admissible in evidence to show that it included the entire stock of the vendor, and the receipt given at the time of the execution and delivery of the note is proper evidence to prove on what account said note was given.

4. Defendant having offered in evidence receipts for certain payments dated subsequent to and claimed to be on account of the note given, no other debts being proven, the burden of proof thereupon shifted to plaintiff to show that said payments were on some other account than the note aforesaid.

Appeal, from a judgment for plaintiff, from the Fifth Judicial District Court, Socorro County. Reversed and remanded.

The facts are stated in the opinion of the court.

WARREN & FERGUSON for appellant.

The court erred in excluding the written memorandum of sale and the receipt for the promissory note executed and delivered by plaintiff's intestate to the defendant below. Comp. Laws 1897, sec. 3021; 3 Jones, Ev., sec. 901; 1 Jones, Ev., secs. 243, 489, 492; Underhill, Ev., sec. 73; Fellows v. Smith, 130 Mass. 378; Smith v. Smith, 3 Bing. (N. C.) 29; Ivat v. Finch, 1 Taunt. 141; Keifer v. Carusi, 7 D. C. 156; Lamar v. Pearce, 17 S. E. Rep. 92; Gracie's Estate, 27 Atl.

Rep. 1083; Underhill, Ev., 163; 1 Greenlf., Ev., sec. 108; Pom., Mercantile Law, sec. 621.

The court erred in excluding the entries made contemporaneously by defendant on page 5, Ledger, which were original entries although the book was called a "Ledger." This account book was not offered as one kept by defendant as a merchant, under sec. 3031, Comp. Laws 1897, but under the common law. Alling v. Wenzel, 27 Ill. App. 511; White v. Whitney, 22 Pac. Rep. 1138; Lewis v. Maginnis, 30 Fla. 419.

Upon the issue of payment the defendant had the affirmative of the issue, with the resulting right to open and close. 1 Jones, Ev., sec. 177; Cutler v. Wright, 22 N. Y. 472; Tooth v. Maben, 21 Neb. 617; Hough v. Hamblin, 57 Ia. 359.

H. M. DOUGHERTY for appellee.

The refusal of the court to admit the receipt for the note was not error. It did not in any manner tend to corroborate appellant. Comp. Laws 1897, sec. 3021; Gildersleeve v. Atkinson, 6 N. M. 261.

It is not in harmony with the common law to admit a party's books where the entries were made by himself and in most states it is regulated by statute. 1 Greenlf., Ev., sec. 118; Comp. Laws 1897, sec. 3031. Appellant not only failed to show that he came within the class, but failed to make any of the statutory proofs.

The appellant can not now raise the question upon his right to open and close the case, the matter not being assigned as ground in the motion for new trial, nor alleged in the assignment of errors. Elliott on App. Jur., sec. 225.

Nor can this question be raised under a general allegation, but it must be specific. Wallrock v. State, 8 Neb. 384; Lowery v. Frounce, 7 Id. 192.

MILLS, C. J.—On May 8, 1897, Nancy J. Robinson, administratrix of the estate of J. M. Robinson, deceased, brought an action in assumpsit in the district court for Socorro

county, to recover from William H. Byerts upon a promissory note, a copy of which is as follows:

"\$755.95.

Socorro, 11—21—1894.

"Nine months after date I promise to pay to the order of J. M. Robinson seven hundred and fifty-five dollars at his office in Socorro, N. M., with interest from No interest at the rate of — per cent per annum, and ten per cent additional for attorneys' fees in case of legal proceedings to enforce collection. For value received.

"No. ——— Due ———

W. H. Byerts."

The defendant pleaded the general issue, and payment, but before the trial withdrew the first plea, and relied only on that of payment. Trial by a jury was had on December 6, 1897, and a verdict for plaintiff was rendered for seven hundred and forty-one dollars and ninety-one cents, the amount of the debt found due and attorneys' fees. Motion for new trial and in arrest of judgment was filed and overruled, exceptions were duly saved, and judgment being entered on the verdict the defendant below appeals.

There are numerous assignments of error, but as the second and fifth which relate to admissibility of evidence determine the case we shall only consider them, and will treat them as one.

The second assignment is that, "The court erred in excluding competent and material evidence offered by the defendant below;" and the fifth is that, "The court erred in excluding the account book, the memorandum of sale, and the receipt for the note sued on, offered by defendant below."

In 1894, Dr. J. M. Robinson, and Byerts were both in business in Socorro, the former selling furniture and coffins, and the latter carrying on a stationery business. In the summer of that year Robinson sold to Byerts his stock of furniture and coffins, and Byerts sold to Robinson his stationery business. The furniture and coffins were valued at something over eighteen hundred dollars and the stationery at a little over six hundred dollars; so that on the transaction Byerts owed Robinson a difference of about twelve hundred dollars.

On November 11, 1894, Byerts gave Robinson the note in suit. Robinson died on March 11, 1895, and his widow, the defendant in error herein, was duly appointed administratrix of the estate and qualified as such, and afterwards brought suit to collect the note.

It is claimed by the plaintiff in error that at the time of the giving of the note sued on he had paid all the money he owed Robinson, except the sum evidenced by the note, and he further claimed that he had paid that note and in substantiation of this latter claim, on the trial, he produced nine receipts, for various sums, dated between December 1, 1894, and February

18, 1895, duly signed by J. M. Robinson, and
PROMISSORY note:
evidence: pay-
ment. one dated April 3, 1895, signed by Mrs. J. M.

Robinson. The amount of these notes and the undertaking bill for coffin, etc., furnished by Byerts at the death of Robinson, virtually equals the note sued on.

The defendant in error claims that most of the payments evidenced by these receipts were not made on account of the note sued on, but were on account of some other debt due by Byerts to Robinson. What such debt is does not appear in evidence.

During the trial Byerts offered in evidence a certain part of his ledger, page 5, in order to prove his account with Robinson, and to show that it was balanced. The attorney for the administratrix objected to its admission on the ground that the statutory requirements for the admissibility of books of account had not been shown and also because it was not a book of original entry, as the evidence showed the defendant kept a day book at the time.

The latter part of this objection is, we think not well taken; it is true that the defendant stated that he kept a day book, in which he entered sales made by him to his customers, but he also swears that in the book offered the original entries of the Robinson account were made, and that they appeared in no other book. This would, we think, make this page of the ledger admissible in evidence, if the other provisions of law as

to its admissibility were complied with, and the question then arises as to whether or not they were. •

Section 3031, Compiled Laws of 1897, provides that the books of account of any merchant may be admitted in evidence as proof of such account upon the following conditions:

First. That he kept no clerk, or else the clerk is dead or inaccessible.

Second, upon proof, that party's oath being sufficient, that the book tendered is the book of original entries.

Third, upon proof, by his customers, that he usually kept correct books.

Fourth, upon inspection by the court to see if the books are free from any suspicions of fraud.

These provisions seem to us to be wise, and easily complied with by one making the tender. If the party offering books of account kept no clerk, he can so swear, and can testify under oath that he kept the books and made the entries himself, or if the clerk is dead or inaccessible, he can prove that fact and that the entries are in the handwriting of such clerk, and were made in regular course of business. No proof is offered to show such facts. The second proviso, that the book tendered is one of original entry, was we think complied with in this case, the plaintiff in error swearing to such fact. Neither the third nor the fourth provisions of the statute were complied with so far as appears from the transcript, and therefore if the book was offered in evidence under the statute we think that it was properly rejected. Counsel for plaintiff in error, however, claimed that the book was not offered under section 3031 of the Compiled Laws of 1897, but under the common law. By the common law, entries, to be admissible, had to be made in books kept for the purpose, contemporaneously with delivery of the goods, by the person whose duty it was at the time being to make them. In such cases books were admissible as evidence of the delivery of the goods therein charged where the nature of the subject was such that better evidence was not obtainable. Greenleaf on Evidence, No. 117.

We think that even the common law requirements as to

the admission of this book were not complied with. Even if they had been, the book would not have been admissible unless the provisions of our statute were followed, as such statute undoubtedly supersedes the common law rule.

Under the circumstances of this case, the requirements of the statute not being complied with, we think that there was no error in excluding this book of accounts. Had the proper proofs been made, it might have been admissible.

This suit, being brought by the administratrix to recover on a note belonging to an estate, the defendant in error relies on section 3021 of the Compiled Laws of 1897 to recover. This section requires that in suits by or against administrators of a deceased person, an opposite or interested party to the suit shall not recover a judgment on his own evidence in respect to any matter occurring before the death of the deceased, unless such evidence is corroborated by other material evidence. It therefore becomes necessary for defendant, in order to prevail in his defense, to offer in addition to his own evidence as to payment corroborative evidence. It is not necessary in determining this cause to write a treatise as to what is corroborative evidence, as it is fully discussed in the case of *Gildersleeve v. Atkinson*, 6 N. M. 250, in which case as a final conclusion the court says:

“Corroborating evidence is such evidence as tends, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegations or issue if unsupported would be fatal to the case and such corroborating evidence must of itself without the aid of any other evidence exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. Such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue.”

The defendant below, testifies that all he at any time owed Dr. Robinson was the balance due for the purchase of the furniture and undertaking establishment, and to prove

that he had purchased all the said stock that Dr. Robinson had, he offered in evidence a memorandum of sale which reads as follows:

“Socorro, N. M., 9—5th, 1894.

“To whom it may concern:

“This is to certify that I have sold to W. H. Byerts my entire stock of furniture and undertaking, with it my good will, my influence in his behalf, and will protect him in the above named business, and will not enter into the same business in Socorro while W. H. Byerts is in the same business of furniture and undertaker.

Respt.

“J. M. Robinson.”

To the introduction of this memorandum the plaintiff objected, as “being issued two months before the issuance of the note and showing no connection with it,” and the court sustained the objection.

Defendant also testified that he had paid Dr. Robinson from time to time on account of what he owed him, until he had reduced the balance so due to the amount of the note sued on, and as corroborative proof that that was all he owed Dr. Robinson, at the time of the delivery of the note, he offered in evidence a receipt given him by the intestate, as follows:

“Socorro, N. M., 11—22—1894.

“Received of W. H. Byerts a note, seven hundred and fifty dollars, for bal. due on furniture & coffins.

“\$755.91-100.

J. M. Robinson.”

Plaintiff objected because the receipt shows on its face that it is for a balance due on furniture of seven hundred and fifty-five dollars and ninety-one cents, and because the receipt explains itself. The court sustained the objection, on the ground that the receipt appears on its face to have no reference to the note. The rejection of these offers of evidence was, we think, manifest error. The memorandum of sale showed conclusively that defendant below had purchased all the stock of furniture and undertaking, which Dr. Robinson had, and the doctor obligated himself not to enter the same business in

Socorro while Byerts was carrying it on. This certainly is corroborative evidence of the claim of Byerts that he bought no more goods from Dr. Robinson for use in his business as it shows that he bought all of such goods that Robinson had, at the time of the sale, and there is no scintilla of evidence that Doctor Robinson sold him any other property or goods.

The objection of the defendant in error that the memorandum was made two months before the note is untenable. Defendant had the right to go into the entire transaction for which the note was given, in order that he might show by his own and other evidence corroborative thereof what the original amount of the debt was, how much had been paid, and what if any was still due.

The court erred in not admitting the receipt in evidence to go before the jury. The giving of a promissory note is prima facie evidence that an account has been stated as between the immediate parties thereto. 2 Chitty on Contracts, p. 963; Fesenneyer v. Adcock, 16 M. & W. 449, 450; Burmeister v. Hogarth, 11 M. & W. 97, 101, 102.

The objection made to its admissibility, that it "shows on its face that it is for a balance due on furniture of \$755.91," is, we think, the very reason why it should have been admitted. This was the ground on which defendant below desired to get it in evidence, viz.: That it showed on its face that it was for the balance due on the purchase of furniture and coffins, and it was admissible and material as corroborative of defendant's evidence and tending to prove the indebtedness evidenced by the note, and that the note was received in full satisfaction of the antecedent debt, growing out of the purchase of the furniture and coffins. Byerts swears positively that at the time he gave the note to Dr. Robinson it was in full for the balance due on the purchase of the furniture and coffins, and this receipt was offered as corroborative evidence. We think it is clearly corroborative of his claim and that it should have gone to the jury along with the other evidence, for them to consider. If these two papers had been admitted in evidence, the plaintiff might have shown in rebuttal, if deemed necessary that the

payments for which receipts were given were on some other account than claimed by Byerts. After the introduction of the ten receipts, the burden of proof shifted and it was on the defendant in error to show that the payments for which they were given were on some other accounts than the note.

There being palpable error in the judgment appealed from, in not admitting the memorandum of sale and the receipt for the note, the same is hereby reversed, and the cause is remanded to the district court of Socorro county, with instructions to grant a new trial.

Crumpacker, Leland, Parker and McKie. JJ., concur.

[No. 800. September 2, 1898.]

JOHN A. LEE et al., Appellants, v. NEILL B. FIELD,
Receiver of NEW MEXICO SAVINGS BANK
& TRUST COMPANY, Appellee.

SYLLABUS BY THE COURT.

- PROMISSORY NOTE—ACCOMMODATION—PAYMENT—PURCHASE—ACTIONS—
DEFENSE—EVIDENCE.—1. A purchaser of a note overdue takes it subject to all defenses which may be shown against his assignor who acquired it at maturity by paying the money due to the holder.
2. A bond of indemnity against loss executed by a third person to an accommodation maker of the note is an equitable and not a legal defense, and is not properly pleadable or shown in evidence in an action at law upon the note under the common system brought by the holder who acquired the paper when it was overdue from the obligor.
3. Payment by a stranger to a promissory note of the money due to the holder without any agreement, express or implied, to purchase the same extinguishes the note.
4. It was error to exclude evidence tending to show whether when a note is presented for payment the transaction was payment or purchase of the note.

5. Where a stranger pays the money due on a note at maturity to the holder, it is necessary in order to constitute a purchase that there be an agreement express or implied on the part of the holder to sell and on the part of the purchaser to buy.

Appeal, from a judgment for plaintiff, from the Second Judicial District Court, Bernalillo County. Remanded.

The facts are stated in the opinion of the court.

CHILDERS & DOBSON for appellants.

The appellants, Lee and Weaver, having signed the note as accomodation makers at the request of the Albuquerque National Bank and for its benefit, it became primary obligor, and payment of the note by said bank cancels the same. Tied. on Com. Paper, sec. 376.

The bank paid the note, it did not purchase it. Danl. Neg. Insts., sec. 1221; Tied. on Com. Paper, sec. 371.

The Savings Bank was not an innocent purchaser of said note, but had full notice of all the facts and took it subject to all defenses existing between appellants and the Albuquerque National Bank, on account of same being overdue at the time it was acquired by the Savings Bank. Fisher v. Leland, 4 Cash. 456; Norton on Bills & Notes, sec. 160. See, also, Lacey v. Clark, 64 N. Y. 209, and citations; Chester v. Dow, 41 Id. 279; Cason v. Heath, 12 S. E. Rep. 678; Loan & Trust Co. v. Water Co. et al., 78 Fed. Rep. 881.

F. W. CLANCY for appellee.

The evidence does not show any payment of the note sued on. Byles on Bills, 216; Bank v. Mitchell, 9 Metc. 297; 2 Par. on Notes and Bills, 216; Deacon v. Stodhart, 9 C. & P. 693; Same v. Same, 2 M. & G. 323; Jones v. Broadhurst, 9 M. G. & S. 177.

There is no evidence to support the position that the Savings Bank is chargeable with any knowledge of the transac-

tion in which the note originated. *Bank v. Harrison* 10 Fed. Rep. 252; *Frenkel v. Hudson*, 82 Ala. 158, and citations; *Story on Agency*, sec. 140; *Barnes v. Gas Co.*, 27 N. J. Eq. 36; *Powles v. Page*, 3 C. B. 16; *Bank v. Christopher*, 40 N. J. Law 437; *Stevenson v. Bay City*, 26 Mich. 45; *Bank v. Cashman*, 121 Mass. 490; *Innerarity v. Bank*, 139 Id. 334, 335.

PARKER, J.—This is an action of assumpsit brought by appellee as receiver of the New Mexico Savings Bank & Trust Company, to recover on a note for twenty-five hundred dollars, signed by J. A. Johnson, as maker and by appellants as accommodation makers. The note was payable to one Emma J. Harris, and by her discounted to the Bank of Commerce, who presented it at the Albuquerque National Bank, where it was payable, at maturity, January 27, 1892, and received the money due on it. On February 19, 1892, the Albuquerque National Bank sold and delivered the note, which it had until that time carried as a cash item, in place of the money it had paid to the holder, to the Savings Bank, of which appellee is receiver, attached to the individual note of said Johnson, for \$2,652.50, dated January 26, 1892, and upon which was indorsed a memorandum: "Note of J. A. Johnson, J. A. Lee and W. M. Weaver collateral." At the time of the making of the note sued on, the Albuquerque National Bank was interested in procuring a settlement to be effected between Johnson and Harris, and procured appellants to sign the note sued on as accommodation makers, and to secure them against loss, executed and delivered to appellants a bond of indemnity, conditioned to indemnify and save harmless the appellants, as indorsers on said note, and in the event said Lee and Weaver should have to pay said note or any portion thereof as such indorsers, to reimburse them for all moneys which they might have to pay on account of said note. This bond of indemnity was offered in evidence by appellants, and excluded by the court upon the objection by appellee. Appellants offered to prove that at the time Johnson gave the note to the Albuquerque National Bank for \$2,625.50, he did

so at the request of S. M. Folsom as president of the bank and upon the understanding that the proceeds of the same would be applied to the payment of the note sued on in this case, and that the note sued on was to be retained simply as a memorandum of the transaction. This proof was excluded upon the objection of appellee. At the close of the trial both sides moved for an instruction for a verdict and, the motion of appellee being granted, the jury found a verdict accordingly, and judgment was entered thereon. The issues were made upon a declaration, plea of the general issue, and similiter under the common law system of pleading formerly in force in this territory.

1. We assume that the Savings Bank, of which appellee is receiver, having taken the note sued on after PROMISSORY note: purchase. maturity, appellee's action is subject to the same defenses as if suit had been brought thereon by the Albuquerque National Bank.

2. The bond of indemnity offered by defendants we think was properly excluded. The suit was tried as an action at law, under common law pleadings although after the code went into effect. While under the code legal and equitable defenses may be pleaded in the same action ACTIONS: defense. (and it was in force when special pleas were filed setting up this bond as a defense), still the parties acquiesced in the action of the court in treating the case as a common law case, and as such limited as to pleadings and proof, and elected to go to trial upon that basis. They can not be heard to complain here. The defense of the bond is an equitable and not a legal defense to the collection of the note. It is not properly pleadable or shown in evidence in an action at law under our former practice. That it is a complete defense against the bank which gave it or its assignee after maturity of the note in a proper proceeding in equity, or where properly pleaded under the code, there can be no doubt, unless its protection has in some way been forfeited or waived.

3. The principal question presented and which is decisive of the case is whether the note sued on was paid by the Albuquerque National Bank, so as to charge the makers. It will be observed that the Albuquerque National Bank was not a party to the paper in any way, and was under no legal obligation whatever to pay the same when presented. It was therefore a stranger or volunteer when it paid the note, unless its bond of indemnity to appellants to save them harmless created a different relation. It is true the bond of indemnity placed the bank in a position of liability in case appellants were made to pay the note and it protected itself from such liability by paying the note itself. But it had no real interest in paying the note rather than the bond. Each could be paid with the same amount of money. It does not come within the rule that where a person is compelled to pay the debt of a third party to protect his own right he will be subrogated to the rights of the creditor, for the bank was in an indifferent position and might pay either the note or the bond at the same cost, it could gain nothing, it could lose nothing, as against appellants, by paying the note. The bank, therefore, was a stranger, a mere volunteer, when it paid the note, and unless there was some agreement, express or implied, to purchase the note, the payment operated to extinguish it. 18 Am. and Eng. Ency. of Law, 160; 24 Am. and Eng. Ency. of Law, 244; Daniels on Negotiable Instruments, No. 1222; Bainford v. Adams, 104 Ind. 41; Moran v. Abbey, 63 Cal. 56; 2 Edwards Bills and Notes [3 Ed.], Nos. 729, 536; Day v. Humphrey, 79 Ill. 452; Pierce v. Bryant Coal Co., 121 Ill. 590; Moody v. Moody, 68 Me. 155; Tuckerman v. Sleeper, 9 Cush. (Mass.) 177; Eastman v. Plumer, 32 N. H. 238; Sandford v. McLean, 3 Paige (N. Y.) 116; Banta v. Garmo et al., 1 Sandf. Ch. (N. Y.) 383; Lansy v. Clark, 64 N. Y. 209; Burr v. Smith, 21 Bark (N. Y.) 269; Creening v. Patten et al., 51 Wis. 146; Farmers' Loan & Tr. Co. v. Iowa Water Co., 78 Fed. Rep. 881.

PROMISSORY note:
payment.

Appellee seeks to draw a distinction between those cases where a stranger pays the money himself to the holder, and those where the original debtor pays the money as agent for the stranger from whom he has obtained it for that purpose, but we can see no distinction, nor is any made in the cases. (Moran v. Abber, 63 Cal. 56; 104 Ind. 41.) Counsel has cited some English-American authorities in support of a contrary doctrine in regard to payment, but we believe the great weight of authority is as we have stated above.

4. The payment of the money by the Albuquerque National Bank being shown, it became a material matter of inquiry as to whether there was any agreement of sale and purchase between it and the holder. Appellants offered to prove by Johnson that he gave the PROMISSORY note:
purchase. note for \$2,652.50 at the request of Folsom, president of the Albuquerque National Bank with the understanding that the proceeds of the same would be used to pay the note sued on and the note sued on was to be retained simply as a memorandum. This evidence was excluded upon the objection of appellee and in this we think the court committed error. It was material for the appellee to show a purchase of the note and for appellants to show payment. Anything which tended to show that the bank did not buy the note was material and should have been admitted. The ground of objection is stated in the brief of appellee, to the effect that the testimony tended to contradict the indorsement on the note of "Note of J. A. Johnson, J. A. Lee and W. M. Weaver, collateral." But there is nothing to show that this indorsement was made at the time of making the note or that Johnson was a party to it in any way. And in fact the note referred to as attached as collateral was not in the possession of the bank and was not received and paid until the next day.

5. In order for the appellee to recover he must show a purchase by the Albuquerque National Bank. In order to show a purchase it was necessary to show an agreement, express or implied, on the part of the holder to sell and on the

part of the bank to buy. Daniels, Negotiable Instruments, No. 1221; Bainfords v. Adams, 104 Ind. 41; Edwards Bills and Notes [3 Ed.], Nos. 729, 536; Lansy v. Clark, 64 N. Y. 209; Burr v. Smith, 21 Barb. (N. Y.) 263. And if the holder of the notes did not expressly or impliedly sell the note, the appellee can not recover.

6. The court erred in instructing the jury to find a verdict for appellee. The question as to whether there was a sale and purchase of the note was one of fact upon EVIDENCE. which the parties were entitled to go to the jury under proper instructions. Upon the record as it stands, it would, perhaps, have been proper to instruct the jury to find for the defendant. But we can not say but that appellee did not make proof on this point for the reason that it was not necessary under the rulings of the court.

For the reasons assigned the cause is remanded with instructions to grant a new trial.

Mills, C. J., Leland and McFie, JJ., concur; Crumpacker, J., having tried the case below, took no part in this hearing.

[No. 801. September 2, 1898.]

WATER SUPPLY COMPANY OF ALBUQUERQUE,
Appellant, v. CITY OF ALBUQUERQUE and
BOARD OF EDUCATION OF CITY OF ALBU-
QUERQUE, Appellees.

SYLLABUS BY THE COURT.

PUBLIC SCHOOLS—MUNICIPALITIES—WATER SUPPLY—INJUNCTION.—1. The public schools of the city of Albuquerque organized under the laws of 1891, are not city schools.

(a) The board of education of the city of Albuquerque, is a distinct corporation for school purposes and is not a mere function or part of the municipal government of the city.

2. Under a contract by which the Water Supply Company of Albuquerque agreed to furnish the city of Albuquerque with twelve million gallons of water every six months for "city purposes" to be used as the city council may direct. Held: that it is not a city purpose to furnish water to the board of education for the use of the public schools in the city of Albuquerque, and upon the refusal of said board to pay for the water necessary for said schools, injunction will not lie to prevent the water company from shutting off the water from the schools.

Appeal, from a decree for complainants, from the Second Judicial District Court, Bernalillo County. Reversed and remanded with directions.

The facts are stated in the opinion of the court.

CHILDERS & DOBSON for appellant.

Under the act creating boards of education, they are not quasi municipal corporations, but political corporations or agencies of the territory to promote the educational interests thereof. Acts Feb. 11, 1891, and Feb. 26, 1891; 1 Dill. on Munic. Corp., secs. 19-23; *State v. Leffingwell*, 4 Mo. 458; *St. Louis v. Shields*, 62 Id. 247; *Heller v. Stremmel*, 52 Id. 309; *Knowles v. Board of Education*, 7 Pac. Rep. (Kan.) 561.

The board of education, the city of Albuquerque and the water company for nearly four years construed the contract alike—that the board of education was not entitled to the free use of water, which construction by the parties interested should be given due consideration. *Railroad Co. v. Trimble*, 10 Wall. 367. See, also, *National Water Works Co. v. School District*, 23 Mo. App. 227.

It is a reasonable regulation, and the water company had the right to shut off the water from the school buildings upon receipt of the notice from the board of education that it would not pay for water used by it after February 1, 1898. *Appeal of Brunm*, 12 Atl. Rep. 855; *People v. Gas Light Co.*, 45 Barb. 136; *Williams v. Gas Co.*, 4 Am. and Eng. Corp. Cas. 66; *Mosey v. Gas Light Co.*, 38 N. Y. 185; *Insurance Co. v.*

Philadelphia, 88 Pa. St. 393; Hotel Co. v. Water Co., 28 Pac. Rep. 320.

WILLIAM D. LEE and NEILL B. FIELD for appellees.

The maintenance of free non-sectarian public schools is a municipal function. 1 Dill. on Mun. Corp., sec. 183; Laws 1891, chap. 77, sec. 7, p. 138; Laws 1891, chap. 77, sec. 22, p. 141; Comp. Laws 1884, sec. 2788; Laws 1897, sec. 2402, sub-divs. 48, 66, 70; *Le Contenlx v. Buffalo*, 33 N. Y. 335; *McDonough v. Murdock*, 15 How. 403; *Vidal v. Girard*, 2 Id. 189; *Herron v. Cary*, 24 Id. 505; *Kelly v. Pittsburg*, 104 U. S. 81; *Donnelly v. Cabaness*, 52 Ga. 211.

The city purposes for which the water paid for by the city may be used include lawful purpose to which water owned by the city may be applied. *Sun Printing Ass'n v. Mayor, etc.*, 40 N. Y. (Sup. Ct.) 611; *Hequenbergh v. Dunkirk*, 49 Hun. 553; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Savings Society v. Philadelphia*, 31 Id. 175; *Lehigh Water Co.'s Appeal*, 102 Id. 515; *People v. Kerr*, 27 N. Y. 194; *Story v. Railroad Co.*, 90 Id. 160; *People v. Kelly*, 76 Id. 475.

There is no ambiguity in the language of the contract used, and no such question as is now presented could ever have been considered or discussed by the parties to the contract until after the passage of the resolution of February 7, 1898. *Consolidated Coal Co. v. Schneider*, 45 N. E. Rep. 126; *Childers v. Bank*, 46 Id. 825; *Hale v. Sheehan*, 71 N. W. Rep. 1019; *Davis v. Creamery Co.*, 67 Id. 436; *Cleburne Water Co. v. Cleburne*, 35 S. W. Rep. 733.

The taxpayers of the city of Albuquerque buy the water in question from the Water Supply Company, through their agent, the city council, and cause a portion of it to be supplied to their agent, the board of education. *School District v. Greenfield*, 64 N. H. 85; *Broughton v. Pensacola*, 93 U. S. 268; *Whitney v. Stow*, 112 Mass. 372; *Merriwether v. Garret*, 102 U. S. 501, 512, 513; *Mobile v. Watson*, 116 U. S. 289.

McFIE, J.—This is an action brought by the city of Albuquerque and the board of education of the city of Albuquerque against the Water Supply Company of Albuquerque to prevent the water supply company from shutting off the water from the public school buildings, and alleges:

That the board of education is a quasi municipal corporation created by virtue of the laws of the territory of New Mexico for the purpose of conducting and carrying on the public schools of the city of Albuquerque.

That under the terms of the contract entered into on the seventh day of April, 1894, between the city of Albuquerque and the appellant, The Water Supply Company of Albuquerque, for the supplying of water by the said water company of the city of Albuquerque, and by virtue of a resolution passed by the board of aldermen of the city of Albuquerque on the sixth day of February, 1898, the board of education claimed it was entitled to the use of water for its school buildings free.

After the passage of the resolution by the board of aldermen of the city of Albuquerque on the seventh day of February, the board of education paid for water used by it up to February 1, 1898, and on the eighth day of March, 1898, notified the water company that it would not pay for water used after said first day of February, 1898. The water company thereupon notified the board of education that in pursuance of its notice that it would not pay for water used by it after said date, said water company would shut off the water from the school buildings. This action was then brought and a temporary injunction granted. Defendant demurred to complaint, which demurrer was overruled and the injunction continued. Thereafter defendant filed an answer and upon motion of plaintiffs final decree was entered and appellant granted an appeal.

The third and fourth assignments of error bring before the court all the questions involved in the case, and are as follows:

III. The court erred in holding that the board of education of the city of Albuquerque was a part of the government of said city of Albuquerque.

IV. The court erred in construing the contract entered into by and between the city of Albuquerque and the water company, that the water used by the board of education was used for a "city purpose."

The real issue in this case is whether or not the Water Supply Company of Albuquerque can be compelled to furnish water for the use of the public schools within the city of Albuquerque, without compensation by said board, by virtue of the contract between the water company and the city, dated April 7, 1894.

PUBLIC schools:
municipalities.

Such portions of the contract as are deemed vital in the decision of this case are as follows:

"And the said party of the first part further covenants and agrees to and with said party of the second part, to furnish to said party of the second part, during the said period of of twenty-five years, all water necessary for the extinguishment of fires and for fire purposes, free of charge, and in addition thereto to furnish free of charge twelve million gallons of water every six months during said period of twenty-five years for city purposes, to be used as the council of the said party of the second part shall direct, for the first one hundred fire hydrants rented from it by said party of the second part as hereinafter mentioned, and for each additional fire hydrant after the first one hundred rented from it by said party of the second part, to furnish free of charge to said city seventeen thousand gallons of water each month for city purposes, to be used as said city council shall direct."

It was also provided:

"And the said party of the first part hereby further covenants and agrees to and with said party of the second part to furnish the said party of the second part all additional water required by it (in excess of the water hereinbefore contracted to be furnished free of charge for city and fire purposes) at and for the price of eight cents per one thousand gallons."

Counsel for appellant invites our attention particularly to the words "city purposes" used in the contract, and make this the basis of their contention, that it is not a "city purpose" within the meaning of the contract, to furnish water to the board of education for the use of the public schools within the city of Albuquerque, for the reason that said board is not a part of the city of Albuquerque, nor a branch of its municipal government, but that said board is a distinct and separate corporation organized under the provisions of the laws of 1891, providing a common school system for the territory of New Mexico. Counsel for appellee, on the other hand insist that "the whole tenor of the act of 1891, shows that it was the intention of the legislature to create city schools in the cities, and to make the board of education a mere instrumentality of the city for the government of the schools." Thus a very clear issue is joined upon the third assignment of error.

Whether supplying water to the board of education of the city of Albuquerque is a "city purpose" or not must be determined by our conclusion whether said board of education is simply a branch of the city or municipal government of Albuquerque, or a distinct and separate corporation. As a proper solution of the latter proposition is purely a matter of law, we will proceed to an examination of the laws of 1891, and authorities cited by counsel in their elaborate briefs.

There can be no doubt that in the enactment of the law approved February 12, 1891, and the law passed by the same legislature, approved February 26, 1891, the latter being amendatory to the former, the legislature intended to establish a comprehensive and harmonious system of public schools throughout the territory, applicable to cities, towns and country districts, and all declared to be corporations for school purposes only, with power to contract and be contracted with, sue and be sued, in case of cities and towns in the name of the board of education of the city (or town) of ———, and in outside districts as school district No. —, of the county of ———. Each of these districts, whether in city, town or country, to form a part of the territorial system of common

schools, suitable boards for the government of each being provided for, in cities and towns being called boards of education, while in other districts they are called boards of directors.

The title of the first act makes this clear, being "An act establishing common schools in the territory of New Mexico."

It is true, the words city and town, are used frequently throughout these laws of 1891, and lend color to the contention of appellee that city schools were established by them. For instance, it is provided in section 6 that "all cities and towns shall be governed by this act."

Sec. —. "In each city and town governed by this act there shall be established and maintained a system of free common schools."

Sec. 8. "Territory outside of city limits, but adjacent thereto, may be attached to such city or town."

Sec. 14. Authorizes the board of education to organize and maintain a system of graded schools and establish a high school wherever, in their opinion, the educational interests of the city demand it, and to exercise control over the schools and school property of the city or town.

Sec. 22. Provides that the board shall levy a tax not exceeding five mills on the dollar, and the city council or town trustees shall approve the same.

Sec. 29. Provides that the board may issue bonds for erection or purchase of school buildings, school sites, etc., and section 30 provides that the mayor of the city shall call elections to vote for or against the issuance of bonds, and there are numerous other references to cities and towns in these acts.

Notwithstanding the indiscriminate use of the words cities and towns, in these laws, a careful examination of the entire acts has satisfied us that these words used in reference to the schools established in cities and towns are used in a very general sense, and were not intended to mean that schools thus referred to, were, in a legal sense, city or town schools. We are met, of course, with the suggestion in this case, that in Albuquerque the boundaries of the city and school district are identical, and that the schools are maintained by taxes assessed

upon the same property; and further, that the city council must approve the levy of the board of education; but these suggestions may be answered from the law itself, section 8, which provides that territory outside of the city or town limits, may be annexed by the board of education for school purposes and the property of such annexed territory shall be assessed for taxes for school purposes the same as property of the inhabitants of the city, thus the boundaries are not necessarily identical, and funds used for the maintenance of schools in cities and towns, may be derived from taxes upon property outside of the city limits. Again, the law provides that the board of education shall make the levy of taxes not exceeding five mills on the dollar for school purposes, "which levy shall be approved by the city council, and when approved, the clerk of the board shall certify it to the county clerk," etc. The action of the council in this matter would seem to be more ministerial than otherwise. Officers of both the city and county are called upon to perform certain duties under this act, but their services seem to be required mainly from considerations of convenience and economy.

There are many provisions of the laws of 1891, which indicate that the legislature intended to divorce, as far as possible, the schools in cities and towns from the control and government of those municipalities, and utterly inconsistent with an intent to make them a part of the city government, and under its control and management. We have already referred to the title of the act establishing the schools as territorial corporations. The board of education levies the taxes, and expends the money derived therefrom; and pays the teachers; it elects its own officers, except the treasurer, who acts *ex officio*, and makes all rules and regulations for the government of the schools. There is also a provision that an alderman of the city can not be a member of the board of education, nor can a member of the board be an alderman. Section 10 provides that all cities and towns shall convey to the board of education all property held in the name of such city or town for school purposes, thus divesting cities and

towns of the title to all school property then owned by them, and vesting the title in the board of education. This provision was doubtless intended to apply to the independent city school of Raton, and possibly to other city schools of the territory, thus making the existing city schools a part of the territorial common school system, and exempt from the city debt. The laws of 1891 clothed these school corporations with powers inconsistent with the idea of their being a part of the city government. These boards of education may contract with the city itself in which they are located. They may also sue and be sued, and thus they are vested with power to antagonize and even sue the city, of which, it is contended, they form a part. It would be highly unreasonable to believe that the legislature intended to bring about such an anomalous state of affairs; on the contrary, most of the difficulties are removed by concluding, as we now do, that the legislature intended these school boards to be separate and distinct corporations, not municipal, but for school purposes only, whether in cities or towns or outside of them. That they are not intended to be city schools in a legal sense but were such in a most general sense, the name of the city and local agencies being utilized for reasons of convenience and economy. The fact of their location in cities and towns is immaterial, they still remain a part of the territorial school system provided for by the legislative authority.

Many of the states have adopted a system of common schools, and while some of them are not similar to our own, others are very similar, in that they are systems adopted by the state, and they are made independent of the municipal governments of the cities and towns of the state and have powers and privileges very similar to those conferred on our own schools by the laws of 1891. These state school laws have been passed upon by the courts, and we find that the courts of the states having laws similar to our laws of 1891 sustain the view we have taken of those laws.

A school district is defined by Mr. Dillon in his work upon municipal corporations as follows:

"A school district is a governmental auxiliary of the state, and the state incorporates it that it may more effectually discharge its appointed duties; they are termed involuntary political divisions of the state or territory, created by general laws to aid in the administration of government in carrying out the universal public school system. Their powers relate to matters of state as distinguished from municipal concern, so they are not adjuncts or agencies of municipal corporations unless the legislature creating them makes them so, and their existence may be entirely distinct from that of a municipal corporation." 1 Dillon, secs. 19, 20, 21, 22 and 23.

In the case of Michael Heller v. Phillip Stremmel, 52 Mo. 309, the court referring to the school board of the city of St. Louis, says:

"The board of president and directors of the St. Louis public schools is not a corporation created for political purposes nor is it created for the purpose of enabling the people of the district named to conduct its local, civil government, and the mere fact that its limits of jurisdiction are the same as that of the city of St. Louis, makes no difference in that particular; it is just the same as if it had constituted a township, or any other district described as a school district. The corporation is created to take charge and control of the public schools and make rules for the management of the schools, to take possession and charge of all lands and lots which have been received for the inhabitants of St. Louis for school purposes, and to dispose of the same and apply the proceeds to purposes of education under the provisions of the act. In fact, the corporation is created by the state to assist in carrying out the general common school system of education adopted by the state, and although the particular district is separately organized and incorporated by the legislature, it is no more a municipal corporation, than is the board of directors of any school district in the state."

In the case of Knowles v. Board of Education of the city of Topeka, Kansas, Chief Justice Norton, in rendering the opinion of the court, says:

“The board of education of the city of Topeka, of course is not a private corporation, nor is it a corporation created with the political and legislative powers like cities and towns for the local civil government and police regulations of the inhabitants of the particular district included in the boundaries of the corporation. The fact that its limits or boundaries are the same as that of the city of Topeka, makes no difference in that particular. It is just the same as if it constituted any other territorial district, described as the board of education of said district. The board of education has power to select its own officers, to make its rules and regulations, to establish a high school whenever in its opinion the educational interests of the city demand the same, and to exercise sole control over the public schools and school property of the city. The title of all property held for the use or benefit of the public schools within the territory over which the board of education has jurisdiction is vested in the board.”

The case of *Stroud v. The City of Stevens Point*, referred to in the brief of appellee, is not in point, because in that case the schools of the city of Stevens Point were made part of the city government by the amended charter of the city. The court held that the amended charter having made the schools part of the city government, the city was responsible for the debts of the schools. It is very different in the case of the schools in the city of Albuquerque. The city of Albuquerque is not responsible and can not be sued for the debts of the board of education but the board is responsible and may be sued for its own debt and on the other hand, the laws of 1891 specifically provide that school property shall be exempt from payment of city indebtedness.

The case from Michigan, *Hathaway v. Sackett*, 32 Mich. 101, simply decides that a village in that state could take a bequest for a high school building. There can be no doubt of this. A city or town may establish schools and accept aid for them even without specific statutory authority, unless prohibited by law, but this decision is not in conflict with our conclusion as above stated.

Passing now to the consideration of the fourth assignment of error, we find that the view we have above expressed, practically disposes of it. If the board of education of the city of Albuquerque is not merely a branch or instrumentality of the city's government, but on the contrary is a separate corporation for school purposes, charged with the duty of defraying its own expenses, liable for its own contracts and capable of being sued, it can not well be contended, that furnishing water to this board was for "city purposes" within the meaning of that contract. There is no pretense that the board of education was made a party to the contract; on the contrary the record shows that the board was paying the company for water for the use of the schools, the last payment being made just prior to the commencement of this suit. The record further shows that a notice was served on the water company which was in part as follows:

WATER supply:
injunction.

"Therefore, resolved, that the city council direct that the public schools be allowed the free use of water from the supply to which the city is entitled under the contract of April 7, 1894, between the city and water company.

"And that the said Water Supply Co. be notified by the city clerk of this action, and to make no further charge for water for the schools from this date until further notice."

The above resolution was adopted by the city council on the seventh day of February, 1898, from which it appears that the contract between the city and the water company, has been in existence nearly four years before the city asserted any right to have the board of education supplied with water for the schools under the city's contract of April 7, 1894. Neither the city nor the board seem to have acted upon the construction of the contract now contended for in this court.

As to the meaning of the words "city purposes" no fixed rule can be laid down. As was said in the case of *People v. Kelly*, 76 N. Y. 487, "Each case must depend largely upon its own facts."

Appellee calls our attention to a line of authorities wherein the words "city purposes" are considered, as those words are used in the new constitution of New York, which says, that no city, town or village shall "be allowed to incur any indebtedness except for city, town or village purposes." The cases cited are cases in which the question was whether or not it was a city purpose for the cities of that state to incur indebtedness for various things such for instance, as borrowing money for the construction of the New York and Brooklyn bridge, which was declared to be a city purpose, as an improvement for the benefit of all. Also it was declared to be a city purpose to construct a railroad between adjacent towns, but the court said that it would not be a city purpose to build a railroad from New York to Philadelphia; that it was a matter for judicial construction based upon the facts in each case. But in this case it is not a question of what a city may do, or what contract a city, even the city of Albuquerque, may enter into; but the question is the legal meaning and effect of the contract existing between the city and the water company, at the time this suit was commenced.

Appellees contend that the words "city purposes" have no effect whatever in this contract, that the contract would have the same meaning without them, and stating their contention in the language of counsel, it is that the city has paid for two millions of gallons of water a month, and that the city council can do what it pleases with it. If the contract did not provide that the twelve million gallons of water was to be furnished for city purposes, this contention of counsel would be correct, but it is not tenable as the contract reads. We are of the opinion that these words "for city purposes," are absolutely controlling and operate as a limitation upon the city council as to the purpose for which the twelve million gallons of water shall be used. The city undoubtedly has a right to twelve million gallons of water every six months if it has legitimate city purposes for which to use it, but only in that event. In another part

of this contract water is to be furnished "for fire purposes." Under this clause it could not be contended that the water could be used for other than fire purposes, nor could it be contended that if no necessity arose for its use for fire purposes, that the city could use it for other purposes. Now the limitation in regard to the use of water for fire purposes is no stronger than the limitation for city purposes, and it will be observed that in one clause of this contract, fire and city purposes are grouped together in one sentence, as if it was the intention to make them of equal force and effect. The contracts between cities and water, gas and electric companies, are usually of a flexible nature, and so understood by the parties, for the reason that the necessities of a city in these respects may be much greater one month than another. Take the matter of water for fire purposes as an illustration. In one month there may not be a single fire in the city, and no water at all need be furnished under the contract, but in the next month there may be disastrous fires necessitating the use of large amounts of water, so that the limitations of the purposes for which water is to be used are very important, and we so understand the limitation "for city purposes" in this contract. If the city council are the sole judges as to the purpose for which this water is to be used, could they furnish it to the mills, the factories, or the railroad at Albuquerque; could they furnish it for watering stock? We think not, so long as the words "for city purposes" are in the contract.

The board of education is a corporation distinct from the city, the title and control of the school building in the city of Albuquerque are effectually vested in this board, this board alone could make a contract for water or any other school supplies, the city has nothing whatever to do with the management of its affairs, nor is it under any obligation to furnish water or anything else for the board of education, therefore, we can not see how the furnishing of water to the board of education is a city purpose. It might as well be

contended that it was a city purpose to furnish water to the university or the churches.

A contract very similar to the one now under consideration was elaborately considered in the courts of Missouri in the case of the National Water Works Co. of New York v. School District of Kansas City, Mo., 23 Mo. App. 227. In this case, which arose in Kansas City, the ordinance contract provided that as a part of the consideration for granting the franchise to said water company said water company should furnish pure water for said city, and it was expressly stipulated that the plaintiff should at all times thereafter supply water free of charge "for all public buildings and offices of said city." It was contended in that case, that public school buildings within the city were "public buildings of the city," within the meaning of the contract, and were entitled to water free. The court, in construing the contract, among other things said:

"The school district of Kansas City is an independent corporation in every vital particular. The title and control of the school buildings are effectually vested in the board of school directors—the school district corporation. The city government has no voice nor agency in the matter. It has nothing whatever to do with the school buildings or other property of this incorporated district. The city neither builds, owns nor controls the school houses. They are therefore, not 'public buildings' of the city."

The reasoning of the court in that case we believe to be equally applicable, in principle, to the case now under consideration.

The court below entered a final decree granting an injunction restraining the water company from withholding water from the board of education while compensation thereof was refused, and, for the reasons above stated, we are of opinion that the court below erred in granting this decree. The decree of the court below is reversed and the cause is remanded with instructions to the court below to dissolve the

injunction heretofore granted, and dismiss the case at the costs of the defendants in error.

Mills, C. J., Leland and Parker, JJ., concur; Crumpacker, J., did not sit in this case, having tried the case below.

[No. 709. September 2, 1898.]

WELLS, FARGO & COMPANY'S EXPRESS, Appellee,
v. WILLIAM A. WALKER, Appellant.

SYLLABUS BY THE COURT.

REFERENCE—FINDINGS—WAIVER OF OBJECTIONS—PRINCIPAL AND SURETY—NOTICE—CORPORATION'S AGENTS—PLEDGES—LIEN.—1. Where, on motion of complainant, an order of reference to a master is made to take proofs and report the same with his opinion, but instead the master reports his findings of fact and conclusions of law, it will be presumed, nothing to the contrary appearing in the record, that the court below acted upon the report as made and complainant's failure to specifically object in the court below is a waiver of his right to object here.

2. A finding of fact by a master is equivalent to the special verdict of a jury, and can not be disturbed unless the evidence is manifestly insufficient to support it.
3. Where there is not any evidence to support the findings of the master, the court below properly sets them aside.
4. Where one becomes surety for an alleged existing shortage in the accounts of another, the mere fact that he has knowledge of an unexplained irregularity (and the fact of the acceptance of the security by the creditor, under the peculiar circumstances of this case is such knowledge to the surety) is sufficient to put the surety upon inquiry; and if he fails to seek important information within his reach he can not, in the absence of fraud on the part of the creditor, set up as a defense facts then first learned which he ought to have known and considered before entering into the contract.
5. Ordinarily a corporation is chargeable with any facts which are known to its agents, but in transactions of a dishonest character between co-employees, where one participates in the perpetration of a fraud upon the corporation for the benefit of the other, the law does not infer that the agent will communicate the facts to the corporation, and under such circumstances the corporation is not bound.

6. A pledgee of building and loan association stock is entitled to a lien thereon, as expenses, for payments made by him of assessments thereof, where it is admitted that the levy is legal and that there would be an infliction of fines against the stock for nonpayment of the assessments, if the pledgor fails or refuses to pay the same.

Appeal, from a decree for complainant, from the Second Judicial District Court, Bernalillo County. Affirmed, overruling the former decision of this court in this cause.

The facts are stated in the opinion of the court.

F. W. CLANON and NEILL B. FIELD for appellant.

C. N. STERRY for appellee.

CRUMPACKER, J.—It is necessary to an understanding of this cause to present a rather voluminous statement of the facts.

The appellee, a corporation (in this statement hereafter called the express company) filed its bill in the court below to foreclose a lien upon a certificate of twenty shares of stock in the Co-operative Building & Loan Association of Albuquerque, New Mexico. The certificate for which was issued by such association to the appellant, W. A. Walker, and by him indorsed and delivered to the express company on the nineteenth day of December, 1893, was to secure the payment of a note dated December 20, 1893 (actually executed December 19, 1893), executed jointly and severally by E. L. Gilbert and W. A. Walker to Charles H. Young as agent for the express company for \$1,301.20, payable thirty days after date, without grace. The defendant Walker, having served, answered in substance that he was surety for Gilbert on said note, and alleged that the note was executed and the stock pledged to secure an indebtedness from Gilbert to the express company for the money embezzled by him as agent of the express company and that he was induced to sign this note and pledged this stock through the fraud of the express company in concealing certain facts from him at the time of the

execution of these papers which were well known to the express company. After the issues were joined in this cause the case was referred to the standing master in chancery. The master reported all the evidence heard before him together with his findings of fact and conclusions of law to the court. Upon giving in of the report the express company filed its exceptions to certain of the findings of the master. Upon the hearing of these exceptions the court set the report aside and entered a certain order. After this order was made the express company filed a motion for rehearing and upon this rehearing the court below modified the former conclusion and entered a decree for the complainant. From the evidence reported by the master the following facts fully and clearly appear. The defendant E. L. Gilbert worked for the company at Albuquerque as its agent in charge of its office for eight years prior to December 15, 1893, and established with the company and its officers and in the community where he lived a good reputation for honesty and integrity and ability in his line of employment. On and previous to December 14, 1893, a Mr. Hatch who had been route agent for the company with headquarters at Albuquerque was transferred to San Francisco, and arrangements made to promote E. L. Gilbert from agent at Albuquerque to route agent in place of Hatch. On the fourteenth day of December, 1893, the Times, a newspaper published in Albuquerque printed an article under the heading of "Deserved Promotion" which stated that E. L. Gilbert had that day become route agent of Wells, Fargo & Company with headquarters at Albuquerque, in place of Mr. Hatch, and complimentary notice in connection therewith. On December 15, 1893, the Daily Citizen, published a somewhat similar article. There appears absolutely no connection of the express company with the publication of either of these articles. Mr. Gilbert was checked out December 14, 1893, by Mr. Hatch, who found that Mr. Gilbert's accounts were all right. On December 15, Mr. C. H. Young, connected with the express company as district superintendent and agent there at that time, discovered that Mr. Gilbert had received appar-

ently from the Atlantic & Pacific Railroad Company, \$1,201.20 upon two vouchers which he had signed for Wells, Fargo & Company, being the vouchers for July and August, 1893, and that this money was unaccounted for by Gilbert. Immediately upon this discovery he called upon Mr. Gilbert for an explanation, and Gilbert stated to him that there was no doubt that he had signed these vouchers and had received the money upon them; but that there must be a mistake somewhere about it, which if given time he could explain. Mr. Young had known Mr. Gilbert for some eleven years and had known him to be a reputable, industrious and honest man, who had given complete satisfaction as agent for the eight years that he was agent at Albuquerque, both as to his ability and as to his honesty and integrity; and believing and hoping that Mr. Gilbert would be able to make some explanation that would be satisfactory to the company he gave Mr. Gilbert that opportunity, indefinitely suspending him from his position, and connection with the company pending this investigation. Mr. Young stated that he had no knowledge of any facts that created any idea of moral turpitude in this direction beyond the fact that Gilbert had signed these vouchers and had received this money and concerning which Gilbert earnestly claimed that there was some mistake which he would be able to explain if given an opportunity. Mr. W. A. Walker, the appellant, had known Mr. Gilbert for some eight years and had known that his reputation for honesty and integrity in this community was good. Mr. Gilbert had been very kind to Mr. Walker at one time during an illness, and Mr. Walker was a special friend of his. Mr. Walker read the newspaper articles and believed them to be true. The first publication was on Thursday, the fourteenth, and the other on Friday, the fifteenth. On the afternoon of Sunday, the seventeenth, Mr. Walker received a note from Mrs. Gilbert asking him to come to the Gilbert house. Upon that Mr. Walker and his wife went over to call upon Gilbert and found that they appeared to be in a great deal of trouble, and in talking it over he told Walker in substance his trouble. Gilbert and Walker there-

upon from that time to the evening of December 19 tried to borrow money enough to make this shortage good from different persons on a note that was to be executed by Gilbert as principal and Walker and another as security. They saw quite a number of people together and Mr. Walker saw several himself in trying to borrow money for Gilbert. Mr. Walker at this time had the certificate of stock in the loan association, but it was in the hands of a third party who was holding it as security for a loan of \$100. About five o'clock on Tuesday evening, December 19, Gilbert went to Walker and told him that if he was willing to let this stock go as his security for three or four days it would be all right. Mr. Walker consented to this upon an agreement that the express company should advance money enough to pay the \$100 for which the stock was then held. They then went directly to the office of the express company in this city and the note described in the bill was written out and signed and the transfer of the stock made, the express company advancing the necessary funds to redeem the stock. This was the first time that any of the parties connected with the express company had any knowledge of the fact that Walker was becoming security or proposing to become security for this indebtedness; and they only knew it as he signed the note and arranged with them to advance the money to take up the stock. While the note is dated the twentieth its execution was effected on Tuesday evening, the nineteenth. Walker knew that Gilbert admitted signing vouchers for the cashier of the railroad company aggregating the amount of this shortage, he knew that Gilbert admitted that he had signed these vouchers and that he was legally responsible; he knew that Gilbert claimed that there was some mistake about it which he could explain, if given an opportunity, but that if the express company did not propose to retain him in its employ he would not make the shortage good if it really existed. He believed that if no explanation could be made Gilbert would go to the penitentiary. The express company knew that Gilbert had been indefinitely suspended, pending an investigation, and Walker knew from

Gilbert's statement that unless he made this money good and explained things satisfactorily he would not get his promotion. The cashier of the express company at Albuquerque had during a year prior to this time assisting Gilbert in hiding Gilbert's defalcation of nearly \$2,000, distinct from this particular transaction which was not detected until after Walker became surety for Gilbert.

This cause once decided by this court, and reported (50 Pac. Rep. 353; Justice Bantz, dissenting, p. 293) is again presented on rehearing for our determination.

The bill of complainant, answer, order of reference and stipulation are set out in toto, at pages 353-7 of the former majority opinion of this court and are here referred to for enlightenment upon the issue.

The master took proofs and reported his findings of facts and conclusions of law in favor of the defendant, Walker, and recommended that the plaintiff's bill of complaint be dismissed, to all of which plaintiff filed some twenty-six exceptions, and on final hearing, the court below sustained the exceptions, and found for the complainant, and ordered that "the said certificate of stock be sold" in default of the payment of the sum found due from defendant Walker. It is from this decree that the cause is here on appeal.

The questions to be determined are presented by the following assignment of errors by appellant.

1. That the court erred in sustaining the exceptions of appellee to the report of the special master in the cause.

2. The court erred in rendering a decree in favor of the complainant in the court below.

3. The court erred in decreeing to the complainant a lien for the entire amount of the note sued on, with interest.

4. The court erred in decreeing to the complainant a lien to secure the payments voluntarily made by the complainant to the building and loan association.

5. The court erred in refusing to enter a decree in accordance with the report and recommendation of the special master.

We will first give our attention to the power of the chancellor to set aside the findings of the master in this cause.

It is certainly true, as contended by appellee, that the order of reference in this cause to the master to take the proofs

merely directed him "to report the same with his opinion thereon," and made the duties of the master purely advisory; yet, nevertheless

REFERENCE: bindings: waiver of objections.

we are constrained to hold that where, as in this case, the order was made on appellee's motion, and the master actually reported the proofs together with his findings of fact and conclusions of law, that the objection is waived by appellee's failure to object in the court below on this specific ground that the report of the master exceeded the scope of the reference, and nothing appearing in the record to the contrary court will presume that the court below acted upon the report as so made by the master. Therefore, this cause stands as if it were originally referred to the master by the assent of the appellee to take the proofs and report his findings of fact and conclusions of law, and that it is well settled by numerous decisions of this and of the supreme court of the United States, that a finding of fact made by a master is equivalent to the special verdict of a jury, and can not be disturbed, unless the evidence is manifestly insufficient to support it. (Givens v. Veeder, 50 Pac. Rep. 315.)

The second question therefore is, whether or not the evidence is sufficient to support the findings of the master?

A painstaking review of all the testimony is convincing that this court in its former majority opinion overlooked controlling facts and reached conclusions not warranted by the evidence. To the contrary of statement there made, it is beyond cavil clear

PRINCIPAL and surety: notice: corporation's agents.

that the officers and agents of appellee were in possession of no facts with respect to Gilbert's defalcation of which appellant was not also actually aware or constructively deemed to have knowledge up to the time that he became surety from sources other than the agents of appellee; all he knew, he knew from representations made by Gilbert himself

and the public press; what he knew was that appellee alleged a shortage in Gilbert's accounts, that Gilbert himself admitted the existence of the shortage and that no matter how it occurred Gilbert was legally responsible for it; that Gilbert was in a "great deal of trouble" "and he believed him liable to a criminal prosecution and conviction; that the public press of the morning of the fourteenth and afternoon of the fifteenth of December, 1893, represented Gilbert as having been promoted, and as being a man of strict integrity; that Gilbert himself represented that if he could make the shortage good "he could still go on with his promotion," "that the company wanted him to make it good but that if they were going to turn him out he wouldn't make it good." Whether or not these newspaper articles were given out by authority of appellee, as to which there is no evidence, is immaterial; because at the time of their publication, so far as we can ascertain from this record they were the truth as to Gilbert's promotion and believed by the parties to be true as to his honesty. Gilbert had falsely represented to both appellee and appellant that he had never received this money to his own use, and both parties appeared to have acted upon his statement as truthful; appellee indefinitely suspending Gilbert and forbearing to accuse him pending an investigation, and appellant performing the office of friendship by coming to Gilbert's rescue with temporary financial aid, having every confidence that Gilbert would satisfactorily explain the deficit. Thus Gilbert's affairs stood up to the time of the execution of the note. These facts seem incontrovertibly established. The only difference discernible between the several statements of Gilbert was that to the appellee he admitted having received the money upon the vouchers for the use of the appellee and stated that there must be some error; while to the appellant he denied having received the money on said vouchers to his credit as agent of appellee or at all, and stated that there must be some mistake. It is contended that appellee on this statement of facts was bound to know of Gilbert's moral turpitude and therefore to correct the impression of the public and appellant by the

newspapers, as to his honesty, and that appellee's agents sitting silently by while appellant executed the note as surety was such a concealment of facts as to perpetrate a fraud upon appellant. We can not concede the correctness of these conclusions. We know of no rule of law which enables us to say under the circumstances of this case that appellant's faith in Gilbert's statement was any greater or entitled to more consideration than the faith of appellee in them. True there was a falsehood, but appellee could only detect it by a scrutiny of the accounts for a period of half a year or more, while appellant by asking one question of appellee's agent or of the cashier of the railroad company (of neither of whom he admits having made or attempted to make any inquiry whatever) as to whether or not these vouchers had been paid, would have disclosed a deliberate lie by Gilbert, and at once exposed his criminality. We take it as established in this case that both appellee and appellant at the time of the execution of the note considered the status of Gilbert to be simply negligent, and the note was given to secure the debt, if upon investigation it were proved to exist. The appellant certainly knew from statements made to him by Gilbert that the affairs of Gilbert as published in the newspapers had undergone a material change, and as to his disadvantage, some days prior to the signing of the note; and in the absence of any other evidence affecting the appellee that Gilbert was to be retained in its employ, there being no proof of fraudulent intent in fact, no case is here made out which could release the appellant from his obligation as surety. Appellant's knowledge that there was an irregularity in Gilbert's account with appellee was sufficient to put him upon inquiry, and as said by the learned justice in his dissenting opinion, "In *McGee v. Insurance Company*, 92 U. S. 98, the court say (while fully recognizing that the slightest fraud by the creditor will relieve the surety), 'But there is a duty incumbent upon him (the surety); he must not rest supine, close his eyes and fail to seek important information within his reach. If he does this and loss occurs he can not, in the absence of fraud on the part of the creditor, set

up as a defense facts then first learned, which he ought to have known and considered before entering into the contract.' 'In such circumstances the creditor is under no obligation legal or moral to search for the surety and to warn him of the danger of the step he is about to take. No case has gone so far as to require this to be done.' *Ham v. Grove*, 34 Ind. 18.

Upon the testimony of Burt, the cashier of appellee during the year or so preceding this discovery of Gilbert's shortage, it is sought to predicate the knowledge by appellee of Gilbert's dishonesty "for more than one year prior to December 20, 1893."

It is admitted that Gilbert was guilty of speculations entirely distinct from the one here involved for a period of nearly a year prior to the detection of this shortage, and therefore unless it is established either that appellee failed to use ordinary care to discover such frauds or that the knowledge of the cashier, Burt, is imputable to appellee, we must decide that the court below committed no error in setting aside the findings. All the testimony as to lack of ordinary care in the inspection of the accounts is embraced in the following question and answer: "State Mr. Burt whether or not at any time during the existence of this defalcation and prior to December 14, 1893, if any representative of Wells, Fargo & Company had appeared in that office and counted the cash, when you were not expecting to have it counted, and you had no notice that it was to be counted, he would have inevitably discovered the existence of this defalcation? A. Yes, sir; he would." There is nothing in the testimony to show that Burt was not always expecting to have it counted, or that he ever had notice of the appellee's intention to examine his accounts. On the contrary, the appellant by his own witness established the fact that the appellee had a route agent whose duties were to audit these accounts, and that the accounts in this particular office were audited in August, 1893 (after a defalcation existed), and apparently were correct. We must hold that the testimony of the witness was a conclusion, incom-

petent as evidence in this case. Appellee's auditor had the right to assume that the cashier was honest and performed his duty, and that if the books agreed with the vouchers and cash turned over that the account was correct. However Burt and Gilbert by their superior cleverness and cunning quite outwitted the auditor, and appellee was unable to learn the true state of affairs. Ordinarily a corporation like any other principal is chargeable with any facts which are known to its agents within the scope of their employment, but these transactions between Burt, the cashier, and Gilbert, the agent, which were of a dishonest character, and in which Burt was a participant in the fraud for the benefit of Gilbert, the law does not infer that the agent will communicate the facts to his principal, the corporation, and under such circumstances the corporation is not bound by his knowledge. (*American Surety Company v. Pauly*, 170 U. S., p. 150.)

We, therefore, can not discover sufficient evidence to support the material findings upon which the master based his conclusions of law that appellant was released from his liability to appellee as surety of Gilbert.

Finally, the fourth assignment of error remains for consideration.

Has appellee acquired a lien upon the stock pledged for the payments made by it to the building and loan association upon assessments legally levied and to prevent the infliction of fines on said stock so held as collateral? We answer this question in the affirmative. The appellee has a special property interest in the share of stock evidenced by the pledge. We think it is well established by the authorities that the pledgee has the right to pay all assessments as are legally levied upon the stock, which the pledgor may fail or refuse to pay, and which would become a lien superior to the pledgee's interest therein, and to deduct such payments as expenses incurred in preserving and protecting the title and making the security available on maturity. *Schouler's Bailments*, p. 199; *Jones on Pledges*, sec. 400; 18 *Am. and Eng. Ency. of Law*, p. 858, and notes;

PLEDGES: liens.

McCalla v. Clark, 55 Ga. 53; Furness v. Union Nat. Bank, 147 Ill. 571. From the first article of the stipulation entered into by the parties, it is plain that appellant considered himself liable for the assessments referred to therein as paid by appellee, and the third article appellant admits that all assessments referred to therein as paid by appellee were legally levied, and so paid in order to prevent the infliction of fines against the pledged stock, and looked upon in the light of these articles, the fourth article was an admission by appellant that all "Such further payments" (payments of assessments legally levied to prevent infliction of fines) were necessary for the preservation of the stock. And therefore we must hold that the court below had by this stipulation ample evidence before it upon which to decree the appellee a lien to secure the payment so made by it to the building and loan association.

Holding that the court below committed no error in setting aside the findings of the matter, we must overrule the former decision of this court in this case and affirm the judgment of the court below.

Mills, C. J., Leland, McFie and Parker, JJ., concur.

[No. 715. September 24, 1898.]

F. L. PEARCE, Plaintiff in Error, v. W. S. STRICKLER,
Defendant in Error.

SYLLABUS BY THE COURT.

**PARTNERSHIP—CREATION—JOINT ADVENTURES—JOINT PAYERS OF NOTE—
PROMISSORY NOTES—ACTION—EVIDENCE—TRIAL—JUDGMENT—ERROR
—REVERSAL—HARMLESS ERROR.—1.** Where A. B. and C. D. agree to
sell shares of stock owned by them individually and deposit the pro-
ceeds thereof in a bank in the name of both, jointly, a partnership is
not thereby created between them.

2. A promissory note drawn to two persons in their individual names establishes a joint ownership, and not a partnership between the parties to whom the note is given.
3. It is not error to refuse a second instruction upon a point fairly submitted to the jury by instructions given.
4. In a suit brought by A. B. on a note given to A. B. and C. D. and indorsed in blank by C. D. before suit is brought, an ex parte statement of C. D. concerning the execution of the note is not admissible in evidence.
5. Where substantial justice has been accomplished between the parties in the court below, the judgment will not be reversed by this court.

Error, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County. **Affirmed.**

The facts are stated in the opinion of the court.

WARREN, FERGUSON & GILLET for plaintiff in error.

Plaintiff having alleged title by transfer to him from Tiffany could not recover upon the notes as sole holder and owner, or as survivor of Tiffany. Dicey on Parties to Actions, 149, rule 115; 1 Chitt. Pl. 8, 19, 305, 307; Vinal v. Oil & Oil Land Co., 110 U. S. 215; Powder Co. v. Hudson River O. & I. Co., 28 N. Y. Sup. 34; Cushing v. Marston, 12 Cush. 431; Fish v. Gates, 133 Mass. 441; Holliday v. Doggett, 6 Pick. 359; Page v. Wolcott, 15 Gray, 536; Dunker v. Schlottfield, 49 Ill. App. 652; Seeley v. Schenck, 2 N. J. Law, 71; Reed v. Railroad Co., 105 Mass. 303; Chouteau v. Raitt, 20 Ohio, 132; George on Part. 263.

Whether Tiffany and Strickler were partners in these transactions, was a question of fact for the jury, and the court erred in deciding it as a matter of law. Thompson v. Bank, 111 U. S. 529; Oppenheimer v. Clemmons, 18 Fed. Rep. 886; Kingsburg v. Tharp, 61 Mich. 216 (28 N. W. Rep. 74); Boor v. Lowrey, 103 Ind. 468 (3 N. E. Rep. 151); Bank v. Underhill, 102 N. Y. 336 (7 N. E. Rep. 393); Waggoner v. Bank, 43 Neb. 84 (61 N. W. Rep. 112); Fickett v. Swift, 41 Me. 65; Halen v. Insurance Co., 50 Ill. 456.

The court erred both in excluding the evidence as to Tiffany's acts, agreements and admissions in regard to the notes and stock in question, and in the instructions given. Story on Part., secs, 114, 115, 252, 107, 323, 324; Bate. on Part., secs. 331, 383, 1135; 1 Wait, Act. and Def. 78; Lindley on Part. 124; George on Part. 215; Underh. on Ev., sec. 67; Western, etc., Co. v. Walker, 65 Am. Dec. 789; U. S. Bank v. Binney, 5 Mason, 187; Collett v. Smith, 143 Mass. 473; McKee v. Hamilton, 33 Ohio St. 7; Vanleck v. McCabe, 9 N. W. Rep. 872; Water on Set-off, sec. 118; Burrell on Assign. 483.

The court erred in excluding all evidence of matter of defense against the notes, and restricting defendant to set-off. Burgan v. Lyell, 2 Mich. 102; Fletcher v. Ingram, 50 N. W. Rep. 824; Edwards v. Tracy, 62 Pa. St. 372; Sage v. Sherman, 2 N. Y. 417; Blodgett v. Weed, 119 Mass. 215; Pohlman v. Taylor, 75 Ill. 629.

CHILDERS & DODSON for defendant in error.

All actions relating to partnership affairs must be brought by the surviving partner. He is the real party in interest. 17 Am. and Eng. Ency. of Law, 1172, 1173, and citations.

On the death of one of the joint payees of a promissory note, the remedies for collection survive to those living, who may receive payment and sue at law or in equity without uniting the personal representative of the deceased joint payee. 2 Danl. on Neg. Inst., sec. 1183, note A.

A contract may be subsequently waived by parol, but only then upon a new and valuable consideration and before breach. Emerson v. Slater, 22 How. 28; Greenlf. Ev., sec. 303. See, also, Burns v. Scott, 117 U. S. 582; Swan v. Seaman, 9 Wall. 254; Specht v. Howard, 16 Id. 565; Brown v. Spofford, 95 U. S. 474; Forsythe v. Kimball, 91 Id. 291; Par. on Part. 191; Story on Part., sec, 323; Hackley v. Patrick, 3 Johnson, 536.

McFIE, J.—This suit, brought by W. S. Strickler against F. L. Pearce in the district court of Bernalillo county upon two promissory notes for the sum of five hundred dollars each given by Pearce to J. C. Tiffany and W. S. Strickler, dated October 28, 1887, and due in three and six months, respectively.

On the back of each of these notes is the following indorsement:

“For collection,

“J. C. Tiffany,

“W. S. Strickler.”

Strickler brought suit upon these notes in his own name June 26, 1894, more than six years after the notes were given.

On the fourteenth day of March, 1894, a plea of general issue was filed by the defendant.

February 5, 1895, or more than a year after suit was brought, defendant filed three pleas, first, general issue; second, set-off for \$1,320, and third, want of consideration.

On the fourth day of February, 1896, one year after the above pleas were filed, and during the trial of the cause, the defendant filed an additional plea alleging substantially that the consideration of said notes was an agreement of J. C. Tiffany, with the defendant, that he (Tiffany), would within a reasonable time thereafter, sell fifty shares of train signal stock for the sum of \$2,000, and would within a reasonable time pay defendant this amount; that said Tiffany did not pay his as agreed, and therefore the consideration of the notes has failed.

The case was submitted to a jury upon a plea of set-off, and the verdict was for the plaintiff Strickler for the amount of the notes and interest, and the case is now in this court on a writ of error sued out by the defendant Pearce.

To reverse the judgment of the court below the plaintiff in error assigns numerous errors, the first of which is that “the court erred in admitting the notes sued on in evidence, against the objection of the defendant below.”

This assignment of error is not founded on fact, as the record shows no objection to the introduction of the notes in evidence. As no objection was made at the time the notes were offered in evidence, such objection will not be considered here. This objection, if made, would have been unavailing as the declaration contained the general counts upon the notes, and the notes were admissible under them. 124 U. S. 510.

The third error assigned is that the court erred in refusing to permit the defendant below to cross examine the plaintiff when he was on the stand as a witness for himself.

The witness Strickler was placed on the stand, after the notes had been admitted in evidence, for the sole purpose of computing and stating the amount due on the notes sued on, and this was all he testified.

The defendant sought to cross-examine as to the indorsement on the back of the notes and Strickler's ownership of the notes. Objection was sustained to this as not proper examination, and we see no error in this ruling, as the testimony sought to be elicited did not relate in any way to the amount due on the notes.

The second, fourth and fifth assignments relate to the admission and exclusion of evidence, without in any way indicating the evidence held to be improperly admitted or rejected, nor does the motion for a new trial point out such evidence.

It is not incumbent upon this court, therefore, to search the entire record for such evidence as the counsel might have had in mind.

Such assignment indicates the hope of counsel that the court may by its examination discover some errors as to the admission or rejection of evidence upon which a reversal might be had, rather than that error has actually occurred, and that counsel has discovered and relies upon it.

The sixth assignment of error also relates to the exclusion of evidence, but it is corrected in form as it specifically states the evidence held to have been improperly excluded.

To sustain his pleas of want and failure of the consideration of the notes sued on the defendant offered the following paper in evidence:

“Office of J. C. Tiffany

“Deming, N. M., July 12th, 1889.

“W. S. Strickler, Esqr., Albuquerque, N. M.

“Dear Sir: When I sold Mr. F. L. Pearce train signal stock, it was a conditional sale, and I have been unable to fulfill the promised conditions he (Pearce) is entitled to his notes of One Thousand Dollars, given at the time, upon surrender by him of fifty shares of said stock. Also please deliver to him (90) Ninety shares of train signal stock, this being the balance I agreed to turn over to him as collateral on my indebtedness to him.

Yours truly,

“Witnesses

J. C. Tiffany.

“C. G. Cruickshank, M. D.

“J. H. Nelson.”

To the admission of this paper in evidence the plaintiff below objected, upon the ground that it was an attempt to vary the terms of a written contract, that it was without consideration, incompetent, etc. The court sustained the objection and excluded the exhibit, to which ruling the defendant excepted, and now assigns as error.

PARTNERSHIP:
creation: joint
adventures:
harmless error.

This assignment involves the vital point in this case, as the record represents it, and our decision upon it practically disposes of the case. The record shows that on the same day the notes sued on were executed and delivered to J. C. Tiffany and W. S. Strickler, sixty shares of the De Mier Train Signal stock, owned by Tiffany and Strickler individually, each owning one-half of the shares, was issued to and in the name of the defendant Pearce, was delivered to him and that he still held the same at the time of the trial below.

These shares of stock were undoubtedly, the consideration for the notes, and the third plea admits this.

The paper signed by Tiffany is offered in evidence on the theory of the defense that Tiffany and Strickler were

partners, and that the action of Tiffany in signing this paper was binding upon Strickler, and therefore should have been admitted in evidence.

The case seems to have been tried below on the theory that a partnership had existed between Tiffany and Strickler, although there is nothing in the pleadings disclosing such issue.

There was a reference to it in the evidence and the court submitted the matter of partnership to the jury as to the plea of set-off.

From the record now before us, we are of the opinion that the court below erred in trying the case on the theory that a general partnership had existed between Tiffany and Strickler, but inasmuch as trying the case on that theory was beneficial to the defendant, he can not complain, and the error is therefore immaterial.

The notes sued on are not drawn to Tiffany and Strickler as partners, but they are drawn to J. C. Tiffany and W. S. Strickler as joint payees or owners, which is a very different

thing. "A mere joint ownership or community of interest in property does not constitute a partnership, even though the income from it is divided." Am. and Eng. Ency. Law, p. 859; Quackenbush v. Sawyer, 54 Cal. 439; Donnan v. Cross. 3 Ill. App. 409; Haws v. Tillington, 1 Gray 289; Bocklen v. Hardenburg, 37 N. Y. Supe. Ct. 110; Auten v. Ellingsood, 51 Howard's Pr. 359; Schaffer v. Fowler, 111 Pa. St. 450; Brady v. Calhoun, 1 Pa. 140.

In Wells v. Babcock, 56 Mich. 276, it was held that "A series of independent transactions wherein one finds money and buys lands selected by another, profits being divided when lands are sold again, does not make the parties partners."

"An agreement between A. and B. that A. will buy an undivided interest of B.'s lands and divide it into lots and sell it, sharing profits and dividing the unsold lots does not constitute a partnership in the absence of a contract of partner-

PROMISSORY note:
joint payees of
note.

ship." *Munson v. Sears*, 12 Iowa, 172; *Sears v. Munson* 23 Iowa, 380.

It has also been held that copartnership of a patent, or copyright or other personal property does not constitute partnership, but even in such cases, where a contract of partnership is shown or admitted it would control and establish the relation.

There is no agreement for a partnership between Tiffany and Strickler shown in this case, and Strickler denies that a partnership existed. It is true that the defendant Pearce testified that Tiffany and Strickler were partners, but his testimony is rather vague and uncertain and can not be heard to dispute the evidence of the notes themselves, nor vary their terms.

Mr. Pearce testifies that Mr. Beattie was the agent of Mr. Strickler from the mere fact that Mr. Beattie acted as cashier of a bank in the absence of Mr. Strickler who was the cashier. He also testifies as to his claim of set-off that he gave Tiffany and Strickler money at different times, but when the checks were examined it was found that they were given to Mr. Tiffany individually, and on cross-examination admits that Strickler had nothing to do with the matter, that the money was given to Mr. Tiffany himself, that he had been giving Mr. Tiffany money for years and expected to lose some of it. Testimony of Mr. Pearce on this point seems to be his opinion merely, and if the oral evidence was relied upon to establish a partnership, it would be very unsatisfactory indeed.

But the oral evidence of Mr. Pearce on this point is of no value as against the notes which he signed and which were given in the individual names of J. C. Tiffany and W. S. Strickler.

Furthermore, on the back of the notes is an indorsement, which is also signed by J. C. Tiffany and W. S. Strickler as joint owners.

The record shows that J. C. Tiffany was president and W. S. Strickler was secretary and treasurer of the De Mier Electric Train Signal Company and that each of them owned,

individually, a large number of shares of the stock of the company. That the headquarters of the company was in the bank of which Mr. Strickler was cashier. That Mr. Tiffany and Mr. Strickler desired to sell some of their stock, and agreed that when a purchaser could be found each would furnish an equal number of his shares and the proceeds should be put in the bank. Some sales were made and an account was opened as to the proceeds thereof in the names of Tiffany and Strickler, each of the parties having an individual account in the bank at the same time. Of the sixty shares of the stock issued on the books of the company to Mr. Pearce one-half was furnished by Tiffany and the other half by Strickler from their individual shares. On the day the stock was issued to Pearce and the notes were given therefor, Pearce gave Tiffany a check for \$1,000 but he says this was not intended for the stock, but was an advance or loan as Tiffany was going to New York to advance the interests of the company and needed money for his expenses.

The defendant gave Tiffany other sums of money at different times, and now seeks to recover them under his plea of set-off. This whole transaction, as shown by the evidence, negatives the partnership theory, with the exception of the opening of an account in the name of Tiffany and Strickler for the proceeds of sales of stock owned by them individually. This of itself, however, is not such a holding out as would establish a partnership, nor is there any evidence that Tiffany and Strickler held themselves out as partners in any other way, not that the defendant or any one other than themselves, knew of the opening of this joint account, and this transaction under the circumstances of this case, shows nothing more than a method adopted to keep these joint transactions separate from the affairs included in their individual accounts.

The notes sued on are drawn precisely as notes might be drawn for a legal service where two lawyers have been retained and in that case, the partners could not be made partners but simply joint owners of the note.

On the trial below the court submitted to the jury the question whether a partnership existed or not, and the jury practically determined that no partnership existed, when they returned a verdict against the defendant on the plea of set-off.

The defendant in his plea of set-off, alleged that the money advanced by him, was given to Tiffany and Strickler as partners, and he could not recover on this plea unless the partnership existed as the checks were drawn to Tiffany alone.

The court gave the following instructions upon the partnership issue:

“The defense set up here by the defendant is that he does not owe the plaintiff the said sum because at the time the said notes were given the plaintiff was a member of a copartnership between the plaintiff and one J. C. Tiffany, and the said copartnership were at the time indebted to defendant for moneys loaned to said copartnership by the defendant in an amount which should be set off against the said notes.

“The court therefore instructs you that if you believe it has been shown by a preponderance of the evidence that notwithstanding the giving of said notes the defendant advanced and loaned to and for the joint account of J. C. Tiffany and W. S. Strickler the sum of \$1,320 or a less sum, you should find for the defendant as to such sum and deduct the same from the amount of \$1,947.

“If you should not believe that any money was loaned or advanced by the defendant to the joint account of Tiffany and Strickler, but to Tiffany alone, then you should find for the plaintiff in the sum of \$1,947.”

Thus the partnership issue was plainly submitted to the jury and they decided against the defendant Pearce on that issue; therefore, if the court had admitted the statement of Tiffany instead of excluding it the defendant would not have been in any better position, as he would still have lost on the partnership issue upon which his defense was founded. This court will not disturb the finding of the jury upon that issue, as it was within the province of the jury to so find and the court coincides with the jury that there was no partnership.

The paper offered was merely an ex parte statement of Tiffany not made in the presence of Strickler nor with his knowledge or consent; it was in no way binding upon Strickler, nor could it be admitted to vary the terms of the notes which had been executed and delivered nearly two years prior thereto. Burns v. Scott, 117 U. S. 582; Bank of Union Town v. Spackey, 140 U. S. 220.

EVIDENCE: ex
parte statement.

At the time this statement was made by Tiffany he had disposed of his interest in the note by indorsing it in a manner which authorized the holder to sue upon it in his own name.

"If a person who indorses a bill to another, whether for value or for the purpose of collection, comes again to the possession thereof, he is to be regarded, unless the contrary appears in evidence, as a bona fide holder and proprietor of the bill, and shall be entitled to recover thereof." Dugan v. United States, 3 Wheat. 183.

"The special indorsement for collection may be stricken out and is considered as stricken out for the purpose of this suit." Badger v. Caldwell, 6 Cowen, 450, and note; Bank of Utica v. Smith, 18 Jones, 230, and note.

It is not competent for the defendant to deny that the plaintiff is the owner and holder of a note upon which he brings suit as such, without reversing the signature, the indorsement or the delivery of the note." 1 Daniel Neg. Ins., sec. 813; Way v. Richardson 3rd 412.

There is no date to the indorsement on the note but the evidence shows that the paper was written by Pearce and signed by Tiffany when he was on his deathbed at Deming, July 12, 1889, and that Tiffany died three days later. Tiffany had no opportunity to make the indorsement on the notes after he signed the paper, as they were in the bank at Albuquerque and he never saw them; consequently the indorsement must have been made before he signed that statement. He had no right or power to destroy or release these notes in the hands of the legal holder, besides as a release, this paper was without a consideration and valueless.

The paper was inadmissible as evidence against Strickler, for various reasons, and was properly excluded by the court, therefore, the sixth assignment of error can not be sustained.

The seventh assignment of error is practically overruled for the reasons above stated. In this assignment, the error claimed is that the court erred in not submitting to the jury the question of want of failure of consideration. The paper signed by Tiffany and above referred to, was relied upon by the defense to prove want or failure of consideration, the statement of Tiffany being binding upon Strickler as his partner; but as the court below properly excluded this paper there was no evidence upon which to submit it to the jury and inquiry as to want or failure of consideration and therefore no error was committed.

The last three assignments of error relate to the giving and refusing of instructions to the jury and for failure to fully instruct the jury. One of the instructions requested by the defendant and which the court refused to give is to the effect that if the jury believed that the defendant, Pearce, advanced money on the joint account of Tiffany and Strickler they should find for the defendant, etc.

This matter was fully covered by the charge of the court above referred to, and it is not error to refuse a second instruction upon a point fully and fairly submitted to the jury by the charge of the court.

The other refused instruction was to the effect that unless the jury believed that Tiffany during his lifetime had transferred all his interest in the notes to Strickler, that Strickler could not maintain the suit and they should find for the defendant. That J. C. Tiffany signed his name on the back of the notes, is not questioned by plea or testimony. This being established by the notes, the right of the legal holder to sue in his own name follows as a matter of law.

This instruction was not a proper one in this case, as there was no evidence justifying it, and was properly refused.

The charge of the court fairly presented to the consideration of the jury all of the questions of fact covered by the evidence, and the error assigned, that the court failed to fully instruct the jury, is not sustained.

Upon the whole case, we are convinced that substantial justice was done upon the trial in the court below. The piece-

meal manner in which the defense was set up, the defendant relying for a year upon a plea of want of consideration, which admitted that the stock purchased was the consideration for the

TRIAL: judgment:
reversal.

notes, and upon the trial a year later, filing and relying upon a plea alleging that the consideration was a promise made by Tiffany to pay the defendant \$2,000 (double the amount he gave his note for) as soon as he could go to New York and sell the stock, seems so inconsistent and unreasonable, that we are not favorably impressed with the defense.

The real facts seem to be that the defendant purchased this stock at what was estimated to be about half its value, and gave his notes for two-thirds the amount, Tiffany settling a debt he owed Pearce with the other one-third of the purchase price. Tiffany proposed to go to New York to have the invention adopted by the railroads so as to enhance the value of the stock, and sell some of it. The defendant loaned Tiffany \$1,000 individually or as president and manager of the company to defray the expenses of the trip. Tiffany's trip proved a failure, and the stock venture was not a success, and therefore the defendant sought to avoid payment of the notes, and in doing this, several years after he gave the notes, he sets up statements made by Tiffany in private conversation, long after the notes were executed, and having no reference to the consideration of them, and of which Strickler knew nothing and was neither a party to nor bound by, as a part of the original transaction. The defendant admits that he and Tiffany had been friends for years, having many joint business transactions in connection with which defendant had loaned Tiffany several thousand dollars and thus the individual transaction of

Tiffany and Pearce had become confused in the defendant's memory and he is unable to distinguish between them in his testimony.

The record in our opinion, fully justifies this view of the facts, and in this view of the case, substantial justice was done between the parties in the court below, and this court will not reverse a judgment where substantial justice has been done.

The judgment of the court below is affirmed with costs.

Mills, C. J., Crumpacker, Parker and Leland, JJ., concur.

[No. 766. September 24, 1898.]

JOHN SOLOMON, Plaintiff in Error, v. EMILIA
YRISARRI, Defendant in Error.

SYLLABUS BY THE COURT.

EJECTMENT—TRIAL—EVIDENCE—VERDICT—REQUESTS TO FIND—TITLE.—

1. Where there is no substantial conflict in the evidence adduced by the parties plaintiff and defendant, the court may direct a verdict.
2. Where one party wholly fails to make proof of the essential elements necessary to sustain his side of the contention in a suit, and the adverse party has made a prima facie case, the court should direct a verdict for the adverse party.
3. When a party fails to make his proof in a trial, requests for special findings of the jury are properly refused by the court.
4. Open, notorious and adverse possession by a claimant to real estate for the statutory period, either by himself or by those through or under whom he held ripens into a perfect title.
 - (a) That paper writings may constitute a foundation for title or a link in a chain of title, they must be executed according to the laws in force at the time of their execution.

Error, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

WARREN, FERGUSON & GILLET for plaintiff in error.

If the plaintiff below had only made a scintilla of proof of her right to recover, the case should have been submitted to the jury. 2 Thomp. on Trs., sec. 2446, and citations; Woods v. Insurance Company, 50 Mo. 112.

Where there is a conflict of evidence it is the duty of the court to submit the case to the jury. Chaves v. Chaves, 3 N. M. 300; Kirschner v. Laughlin, 17 Pac. Rep. 132; Staab v. Reynolds, Id. 136; Lockhart v. Wills, 50 Id. 318; Railroad Co. v. Stout, 17 Wall. 665; Railway Co. v. Parker, 21 So. Rep. 332; Bell v. Weatherly, Id. 236; Heatherly v. Little, 40 S. W. Rep. 445; Sullivan v. Insurance Co., 8 Pac. Rep. 112; Harlan v. Baden, 49 Pac. 615.

Right to real estate acquired by adverse possession under claim of rights, but without title or color of title, are limited to the lands actually occupied. Barr v. Gratz, 17 U. S. 213; 1 Am. Dig. [Cent. Ed.] 2451, sec. 542; Le Jeune v. Harmon, 45 N. W. 630.

The plaintiff below, if entitled to recover any part of the land, could have only recovered her portion of it that was cultivated, as against the defendant below. Bristol v. Carroll County, 95 Ill. 84; Tyler on Eject. 894; 2 Am. and Eng. Ency. of Law 861; Royall v. Lessee of Lisle, 60 Am. Dec. 712; McSpadden v. Star Mt. I. Co., 42 S. W. Rep. 501.

Under the evidence in this cause the special findings asked should have been made by the jury, and a refusal to submit said special findings was error. Morrow v. Commissioners, 21 Kan. 484, 503; 2 Thomp. on Trs., sec. 2670.

WILLIAM D. LEE for defendant in error.

It has been held where a defendant entered under plaintiff, whether by purchase, gift, lease or otherwise, he can not dispute his title. Williams v. Cash, 27 Ga. 512; Woolfolk v. Ashby, 2 Met. (Ky.) 288.

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The evidence clearly shows that plaintiff below had, through her guardian, been in adverse, uninterrupted possession for about twelve years, and, through her father, from whom she inherited the property in question, as much as twelve years more. This creates in her a title indisputable. *Harpending v. Dutch Church*, 16 Pet. 453; *Probst v. Presbyterian Church*, 129 U. S. 191; *Bradstreet v. Huntington*, 5 Pet. 402.

The submission of specific questions is within the discretion of the court. *Enor v. St. Paul Ins. Co.*, 57 N. W. Rep. 519.

"Where on undisputed facts plaintiff is entitled to recover, it is not error to instruct the jury to find for the plaintiff." *Macon County v. Shores*, 97 U. S. 272; *Orleans v. Platt*, 99 U. S. 676; *Anderson County v. Beall*, 113 U. S. 227.

LELAND, J.—This cause comes into this court on error to the district court of Bernalillo county. Plaintiff in error makes the following assignments of error, to wit:

1. "The evidence being conflicting, the court below erred in directing a verdict for plaintiff."
2. "The trial court erred in deciding that there was sufficient evidence to entitle plaintiff below to recover in this cause."
3. "The court erred in refusing to submit to the jury in this cause the special findings asked for by defendant below."
4. "The court erred in overruling the motion for a new trial of this cause."
5. "The court erred in allowing plaintiff below to recover the whole of the land in litigation."

As to the first assignment of error, we are of the opinion that when there is not a "substantial" conflict in the evidence adduced by the respective parties the court is fully warranted in directing a verdict. If the evidence ad-
duced by a party to a suit is of such a character that should the party obtain a verdict the court would set aside the verdict and grant a new trial, the court surely has a right to anticipate its own action

EVIDENCE: ver-
dict.

by directing a verdict. The conflict in the evidence in this case is not of such character as to cause the case to fall within the rule laid down in 3 N. M. 300.

As to the second assignment of error, the record discloses that this is an action in ejectment, and that both plaintiff in error and defendant in error claim the realty in dispute from one common source of title, and the plaintiff below hav-

EJECTMENT: trial: evidence: verdict. ing proved a prima facie good title, from this common source to the present, by the fixed and well settled rules of the law of evidence, and

the defendant below having failed to show any such title, the court, being the sole judge of the law in this case, had a right, under such state of facts, to decide upon the sufficiency of the evidence and direct a verdict in favor of the plaintiff below.

The third assignment of error is not well taken because the plaintiff's evidence prima facie shows a legal estate in the premises existing in plaintiff below, at the

REQUESTS to find: properly refused, when. commencement of the suit, and a right of entry in plaintiff below, and that at commencement of the suit the defendant below was in posses-

sion of the premises, these being the three elements of the action that plaintiff must establish. After the introduction of evidence by the plaintiff below tending strongly to prove each and all of these elements, it is then incumbent on the defendant below to show by competent evidence a paramount title in herself or some third person that would overcome plaintiff's proof. Defendant below, having wholly failed to make any such proof of paramount title in this case, either in himself or any third person, special findings by the jury could not have responded to any essential feature of the case, and hence defendant below was not injured by the court's refusal to direct the jury to make such findings.

In the matter of the fourth assignment of error plaintiff in error relies mainly on the fact of having been taken by surprise in the matter of the testimony of a witness. Had the lower court refused to grant defendant below a continuance

because of such surprise then this court would feel called upon to more seriously consider this question, but as no continuance was asked for by the defendant below on account of this surprise we will have to leave the party where we found her.

As to fifth and last assignment of error, we think the lower court very properly directed the jury to award all of the land in question to plaintiff below, because the evidence of plaintiff below clearly established a paramount title in such plaintiff for all of the lands in question.

The other questions in this case can be very briefly disposed of because the law is so well settled that their discussion would be fruitless. The paper writing offered in evidence by defendant below, as a foundation on which to base title, is not evidence of anything except the existence of the paper, and does not even rise to the dignity of a contract for the sale or conveyance of real estate, much less to convey title.

Plaintiff's title under the evidence in this case, even though it is the result of open, notorious and adverse possession of plaintiff below, her guardian and those through or under whom she held is as absolute and perfect as though it was under a direct patent from the United States government, by virtue of the statute of limitations.

Judgment of the district court affirmed, with costs and writ of possession ordered to be awarded by the judge of said district court.

Mills, C. J., Parker and McFie, JJ., concur; Crumpacker, J., did not sit in the hearing of this case.

[No. 774. September 24, 1898.]

JOHN W. SCHOFIELD, Receiver, Plaintiff in Error, v.
AMERICAN VALLEY COMPANY and W. B.
SLAUGHTER, Defendants in Error.

SYLLABUS BY THE COURT.

ATTACHMENT—APPEAL—DISMISSAL OF PRINCIPAL ACTION—REVIEW.—1.

When an affidavit in attachment is traversed and trial is had on the issues raised, an appeal can not be taken from the judgment, until final judgment is entered in the main case to which the attachment is auxiliary.

2. After judgment is entered for the defendant on the trial of the issues raised on the traverse of an affidavit for attachment, no appeal can be taken from such judgment when the plaintiff afterwards voluntarily dismisses the main case to which the writ of attachment was auxiliary.

Error, from a judgment for defendant, to the Fifth Judicial District Court, Socorro County. Affirmed, and writ of error dismissed.

The facts are stated in the opinion of the court.

CHILDERS & DOBSON for plaintiff in error.

There was sufficient evidence to go to the jury as to the ground "that defendant was about to remove its property, and effects out of this territory." The court below erred in ruling that a removal of all of defendant's property, if done in the ordinary course of business and without intent to defraud, hinder or delay the creditor, did not come within the statute. Kearney Code 39, Sept. 22, 1846; Comp. Laws 1865, 208, sec. 1, sub. div. 3; Id., p. 742; Rev. Stat. U. S., sec. 5596; U. S. v. Bowen, 100 U. S. 508; Victor v. Arthur, 104 Id.

498; Meyer v. Western Car Co., 102 Id. 1; McDonald v. Hovey, 110 Id. 619.

Punctuation is not to be regarded in the construction of a statute. Hammock v. Loan & Trust Co., 105 U. S. 72; Endl. on Inter. Stat., sec. 61; Cushing v. Worrick, 9 Gray, 382.

A limiting clause in this case "so as to hinder, delay or defraud his creditors," is to be confined to the last antecedent, unless there is something in the subject-matter which requires a different construction. Cushing v. Worrick, *supra*; Dwar. on Stat. 590, 591; Sedg. on Const. Stat. 226 and note; Endl. on Inter. Stat., sec. 414; State v. Conklin, 34 Wis. 21; Goodbar v. Bailey, 22 S. W. Rep. 568.

This court will review the proceedings of the court below as to admission of evidence and instructing the jury on a trial of the issues raised by the denial of the allegations in the attachment affidavit. Leitensdorfer v. Webb, 1 N. M. 34; Talbott v. Randall, 3 Id. 363; Torlina v. Trorlicht, 5 Id. 148; Id., 6 N. M. 54; Schofield v. Folsom, 7 Id. 601; Bank v. Folsom, Id. 611; Curran v. Kendall, 8 Id. 421.

"The order dissolving or sustaining an attachment is a final order affecting the substantial rights of the parties, and may be reviewed without bringing up the whole case, after final judgment; and this is undoubtedly the correct rule, even though there is no direct statutory provision in our code authorizing an appeal in such cases, except as to final orders generally." Drug Co. v. Drug Co., 40 Pac. Rep. 981, and citations; Salmon v. Mills, 66 Fed. Rep. 32; Stanley v. Roberts, 59 Id. 836.

It does not matter that plaintiff subsequently dismissed the suit on the merits, in consequence of the payment of the debt, or by reason of a compromise. He is nevertheless entitled to a review of the action of the court in erroneously instructing the jury to find a verdict for defendant. Detroit Free Press Co. v. Medical Ass'n, 31 N. W. Rep. (Mich.) 537. See, also, Chapman v. Sutton, 32 Id. (Wis.) 683, and citations.

F. W. CLANCY for defendant in error.

Appeal or error does not lie where a party voluntarily dismisses his suit after the decision of which he complains. *Mott v. Hill*, 7 Ga. 99; *Donnelly v. Speer*, Id. 227; *Bank v. Hayes*, 3 Ind. 400; *Newman v. Dick*, 23 Ill. 278; *Bank v. Hicks*, 4 J. J. Marsh. (Ky.) 128; *Imley v. Beard*, 6 Cal. 666; *Sleeper v. Kelly*, 22 Id. 456.

Plaintiff in error can not here obtain a review of the judgment on the attachment affidavit. *Leitensdorfer v. Webb*, 20 How. (U. S.) 186.

MILLS, C. J.—On January the 20th, 1894, the plaintiff as receiver of the Albuquerque National Bank, filed in the district court for the county of Socorro, a declaration in assumpsit, and on the sixth of the following March filed an affidavit for attachment, claiming that the defendants owed the bank of which he was receiver the sum of \$17,580 on account of three promissory notes.

The grounds for the attachment, as set out in the affidavit, were that the American Valley Company “has fraudulently concealed and disposed of its property and effects so as to defraud, hinder and delay its creditors; and that the said American Valley Company is about to remove its property and effects out of this territory; and that the said defendant, The American Valley Company, is about to fraudulently convey and assign, conceal and dispose of its property and effects so as to hinder, delay and defraud its creditors; and that the said defendant, W. B. Slaughter, is not a resident of and does not reside within the territory of New Mexico.”

On the same day bond was filed and summons and writ of attachment was issued, and were placed in the hands of the sheriff of Socorro county for service. Under the writ of attachment the sheriff levied on the property of the American Valley Company, taking into his actual possession at one time, nearly one thousand head of cattle, besides other property.

The defendant company and Slaughter entered separate appearances and duly pleaded to the suit in assumpsit and both traversed the affidavit of attachment. On May 29, 1894, on motion, the court granted a severance, and trial was had on the truth of the affidavit, and the traverse to it filed by the American Valley Company, a jury being impaneled. At the conclusion of the evidence offered by the plaintiff the defendant moved the court to instruct the jury to find the issues in its favor, and the jury by the direction of the court so found. To this instruction the plaintiff duly excepted, and moved the court to set aside the verdict, which motion was overruled and judgment dissolving the attachment and taxing the costs against Schofield as receiver was duly entered.

On January 3, 1898 (nearly four years after the trial of the issue raised by the attachment), the plaintiff gave notice in the assumpsit suit, on which the attachment was based that he would "not further prosecute this cause and moves to dismiss the same." The court accordingly dismissed the case and ordered costs to be taxed against the plaintiff, and on the twentieth of the same month the following order was entered:

"Now comes the parties in this cause by their attorneys, and file their stipulation herein, whereby it is agreed that the record in this case shall show the fact that after the trial of the truth of the attachment affidavit herein, and before the dismissal of the cause, the case was compromised and settled by the payment to the plaintiff of a portion of the money claimed, which was received in full payment of the claim of plaintiff; and that the said stipulation shall be taken as a part of the record in said cause, or that the record of the said cause may be amended in accordance with the said stipulation so as to show the above mentioned facts."

Bill of exceptions was thereafter settled, and that part of the case which relates to the writ of attachment comes before us.

The second, third and fourth assignments of error relate to the admissibility of evidence which the court ruled out at the trial. The first is that the court erred in instructing the

jury to find a verdict for the defendant, and the fifth alleges error in the court refusing to set aside the verdict and grant a new trial.

We might decide the case at once on the assignments of error, but as there are several interesting points raised, which are important in the practice in this territory we will briefly discuss them.

The case is peculiar and we have searched the books in vain to find one parallel to it. A suit in assumpsit is brought to collect a debt, and in the same suit an attachment is sued out, issue joined on the traverse filed to the affidavit on which the attachment is based, and on the trial judgment is rendered for the defendant and the attachment is dissolved. Nearly four years afterwards the plaintiff of his own volition dismisses the assumpsit suit which was the main suit, and on which the attachment rested and without which it could not have been brought, and now seeks to get a review of that part of the proceedings which relates to the judgment dismissing the attachment.

The first question which presents itself is, can an appeal be taken from a judgment dissolving an attachment? The plaintiff seems to think that it can be done, and cites authorities in support of his contention.

ATTACHMENT:
appeal.

In *Watson v. Sullivan*, 5 Ohio St. 42, the court says: "But in case the attachment is discharged by order of the court before judgment, or in case the plaintiff fails to recover judgment, the attachment, in either case, would have been wrongfully obtained, and the plaintiff would have been liable to an action on his undertaking for damages; and the fact that the court had ordered the attachment to be discharged would be evidence against the plaintiff that the attachment had been thus wrongfully obtained; and the action might be immediately commenced for such damages, and such action be determined before the original action, and the plaintiff compelled to pay damages, perhaps, of an error in the court in discharging the attachment. Indeed, reaction, where there is

personal service, in no manner depends on the attachment. There may be a just cause of action, and no grounds for the order of attachment. They are separate proceedings, and, in the opinion of this court, attachment is a special proceeding, which may be reversed before the determination of the action."

And in *Harrison v. King*, 9 Ohio St. 388, the court says: "The attachment is a special proceeding ancillary to the action, but so independent of it that an order in the attachment proceedings may, when final, be the subject of a petition in error during the pendency of the action."

And in *Turpin v. Coates*, 12 Neb. 321, holds that "a ruling of the district court discharging an attachment is a final order, and is subject to review."

And the same is held in *Adams County Bank v. Morgan*, 26 Neb. 148. In *Berry v. Gravel*, 11 Iowa, 135, it is held that an appeal lies from an order dissolving or sustaining an attachment, and cites the cases of *Johnson and Stevens v. Butler*, 1 Iowa, 459, and *Bell v. Preston*, 1 Iowa, 460.

The same rule is held in *Williams v. Hutchinson*, 7 Soth. Rep. 852, and in many other states.

The courts of our territory have not heretofore had to pass upon the question as to whether or not judgments rendered in attachment proceedings are appealable.

For the sake of argument let us admit that such judgment may be taken up for review; that they are final judgments within the meaning of the statute, and are so separated from the main case that an appeal may be had if desired. Admitting this to be the case, the question then is, as to the time within which the appeal may be taken. Section 3136 of the Compiled Laws of 1897 reads as follows: "Appeals in equity cases and writs of error in common law cases may be taken at any time within one year from the date of the rendition of final decrees or judgments * * *." This is the longest time allowed for the taking of an appeal or writ of error by the statutes of this territory.

If, therefore, this case was appealable as being a final judgment, when should the appeal have been taken?

The judgment dissolving the attachment was entered on the first day of June, 1894, and one year from that date would have brought the latest time to which a writ of error might have been sued out, to June 1, 1895, or one year after the rendering of the judgment. The record shows that the writ of error in this case was not sued out until January 28, 1898, or more than two years later than the law allowed such writ to be taken. If, therefore, the attachment is appealable, the appeal must be taken, or the writ of error sued out within the time allowed by the statute, to wit: within one year from the rendition of the final decree of judgment and as this was not done in this case, it consequently follows that if the proceedings on the writ of attachment were in themselves appealable, this case must be dismissed, because a writ of error was not sued out within the time limited by our statute.

But now let us examine the case from the standpoint that the attachment proceedings were not in themselves appealable and that they could only be reviewed after final judgment had been given in the main case of which they are a part.

ATTACHMENT: dismissal of principal action: review.

This would seem to be the law in this territory. It is so held in the case of *Leitensdorfer v. Webb*, 20 Howard, 176, which went to the supreme court of the United States from this territory, and in which the court says:

“It is obvious that in the proceedings in the district court neither the justice nor the amount of the plaintiff’s demand was put in controversy. These were not embraced within the issue raised upon the petition and affidavit. That issue related only to the right dependent upon his ability to show the alleged character of the defendant’s acts, with respect to their creditors generally, and not with respect to the plaintiff particularly or exclusively. The verity and the amount of the plaintiff’s demand were matters for distinct and ulterior investigation. The proceedings, then, upon the petition and affidavit, was in reality a proceeding in abatement, and not in

bar of the plaintiff's debt or right of recovery. This appears to be a regular conclusion from the language of the law of the territory. * * *

"It is true, that by the practice of the state courts the preliminary proceedings upon the petition and affidavit, and any questions of law ruled by the courts in those proceedings, are carried for review to the tribunals of last resort. But this is a practice authorized by the states under their peculiar jurisprudence. The states possess an undoubted power to permit or to require of their courts the re-examination and control of proceedings in their own tribunals, entirely interlocutory in their nature. The appellate or revisory power of this court, as defined by the constitution and laws of the United States is more restricted in its extent than that with which some of the states have invested their courts. By the twenty-second section of the act of congress to establish the judicial courts of the United States, it is declared that final judgments and decreed in civil actions and suits in equity in a circuit court brought there by original process, or removed there from the courts of the several states or from a district court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, may be examined, and reversed or affirmed in the supreme court. But there shall be no reversal for error in ruling any plea in abatement other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as in the nature of a demurrer."

The supreme court of the United States thus held that the finding for the plaintiff in an attachment suit was under our statute an interlocutory decree, and that an appeal from it would not lie, and accordingly sustained the supreme court of this territory. This authority controlling us, we will hold that the same rule prevails in New Mexico. It would manifestly be improper to allow cases to be brought to this court which if the amount involved was large enough could not be carried to the highest court in the land. The writ of attachment is sued out as auxiliary to the main suit, to secure the payment of any judgment which may be recovered therein.

It is not a separate action, although a final judgment as to the right to attach may be entered therein: The writ of attachment can not be sued out until some other action has been begun, to which it is auxiliary. In the present case, the record shows that the assumpsit suit was dismissed by the plaintiff on January 20, 1898, accordingly they can take no writ of error in that suit, nor do they attempt to do so. Where a party voluntarily dismisses his suit appeal or error will not lie from the order making such dismissal, nor will any ruling of the court previous to said dismissal be inquired into. This is a well settled proposition of law.

"The plaintiff, by voluntarily dismissing his suit at the succeeding term, waived any error the court below may have committed in deciding the motion to dismiss. From that decision he has no right to appeal or prosecute error, as it was not the final decision, determining the case, nor has he any right to have the final judgment of court dismissing the case reviewed, as a decision was made at his request and on his own motion." *Newman v. Dick*, 23 Ill. 278.

"This is an appeal from a judgment of nonsuit. The record shows that a nonsuit was granted on the motion of the plaintiff, and an appeal by him does not lie in such cases." *Sleeper v. Kelley*, 22 Cal. 456.

Holding as we do that the suit in assumpsit which was dismissed by the plaintiff can not be reviewed by this court, we can not see how, what is declared to be in *Leitensdorfer v. Webb*, *supra*, an interlocutory decree "and designed to abate the particular remedy by attachment only, and having no application to the plaintiff's right of recovery of his demand" can be considered. The dismissal of the main suit must abate what is auxiliary to it. If a new trial was ordered, and on the hearing the jury found in favor of the plaintiff, and that there was good grounds for the attachment, it could not benefit the plaintiff in his suit in assumpsit, as that has already been dismissed by him. If the plaintiff had desired to test the attachment proceedings he need not have dismissed his suit, but might have pressed it to a conclusion and have taken an appeal

or writ of error which would have brought the whole matter regularly before us. The plaintiff having dismissed the main action we think that the attachment went down with it.

This conclusion disposes of the case, but we have gone further and have carefully examined the testimony offered in evidence, and the rulings of the court thereon, and the objections taken by the plaintiff as shown by the assignments of error, and we can find no substantial errors therein, nor after a careful examination of the record, in the light of decisions heretofore given by this court, can we see that the court committed error in directing the jury to find a verdict for the defendant, nor in refusing to grant a new trial.

We, therefore, are of the opinion that the judgment below should be affirmed, and the writ of error dismissed; and it is so ordered.

McFie, Parker, Crumpacker and Leland, JJ., concur.

[No. 777, 778, 779, consolidated. December 17, 1898.]

JOSEPHINE DESERANT, Administratrix of ESTATE OF HENRI DESERANT, Deceased, Plaintiff in Error, v. CERRILLOS COAL RAILROAD COMPANY, Defendant in Error.

JOSEPHINE DESERANT, Administratrix of ESTATE OF JULES DESERANT, Deceased, Plaintiff in Error, v. CERRILLOS COAL RAILROAD COMPANY, Defendant in Error.

JOSEPHINE DESERANT, Administratrix of ESTATE OF HENRI DESERANT, Jr., Deceased, Plaintiff in Error, v. CERRILLOS COAL RAILROAD COMPANY, Defendant in Error.

SYLLABUS BY THE COURT.

INJURY TO EMPLOYEE—BURDEN OF PROOF—FELLOW SERVANT.—1. In a suit brought to recover for the death of a coal miner, who is killed in an explosion in a coal mine, where the plaintiff claims that the explosion was caused by an air course being partially obstructed by accumulation of water so that sufficient air was not passing through it to properly ventilate the mine, the burden of proof is on the plaintiff to show that such air course was so obstructed that sufficient air was not passing through it.

2. The pit boss of a mine, working under a superintendent who has charge of the whole property and its workings, is a fellow servant of the other employees, and the corporation is not liable to an administratrix for the death of an employee caused by an explosion occasioned by workmen going into a room where there is an accumulation of gas, over a danger signal, with a naked light, either by the direction of the pit boss, or with him.

Error, from a judgment for defendant, to the First Judicial District Court, Santa Fe County. Affirmed.

The facts are stated in the opinion of the court.

F. W. CLANCY and NEILL B. FIELD for plaintiff in error.

The servant assumes only the risks ordinarily incident to his employment. No extraordinary or unusual risks are assumed by him, unless he had knowledge or means of knowing of their existence. *Cowan v. Railroad Co.*, 80 Wis. 284; *Trunk R'y Co. v. Cummings*, 106 U. S. 701; *Cerrillos Coal R. R. Co. v. Deserant*, 49 Pac. Rep. 810; *The Joseph B. Thomas*, 81 Fed. Rep. 278; *Cadden v. Steele Barge Co.*, 88 Wis. 409; *Sherman v. Lumber Co.*, 72 Id. 122; *Clark v. Soule*, 137 Mass. 380; *Behm v. Armour*, 58 Wis. 1; *Naylor v. Railway Co.*, 53 Id. 661; *Penn. Co. v. Whitcomb*, 111 Ind. 212; *McCormack v. Durandt*, 136 Ill. 170; *Swaboda v. Ward*, 40 Mich. 420; *Benzing v. Steinway*, 101 N. Y. 547; *Stringham v. Stewart*, 100 Id. 516; *Pautzer v. Tilly Foster Co.*, 99 Id. 368; *Railroad Co. v. Cavin*, 9 Bush (Ky.) 559.

Instruction number ten given at request of counsel for defendant in error is erroneous. *Springett v. Coleric*, 67 Mich. 362; *Webster v. Sibley*, 72 Id. 630; *Riechendach v. Ruddach*, 127 Pa. St. 564; *Gehman v. Erbman*, 105 Id. 371; *Sexion v. School District*, 36 Pac. Rep. 1052; *McIntyre v. Thompson*, 14 Ill. App. 554.

H. L. WALDO and R. E. TWITCHELL for defendant in error.

There was no evidence to support a verdict for plaintiff. It was the duty of the plaintiff to establish by a preponderance of the evidence not only that defendant was negligent with reference to the keeping clear of obstructions of every kind in the air course, but also that the condition of the air course was the direct or proximate cause of the explosion; also to establish by a preponderance of the evidence that defendant permitted a dangerous body of gas to accumulate in some one of the rooms or passages of the mine, and that this too was the proximate cause of the accident. *Kellogg v. Railroad Co.*, 94 U. S. 469; *Scheffer v. Railroad Co.*, 105 Id. 252; *Hughes v. Railroad Co.*, 16 S. W. Rep. 276; *Railroad Co. v. Schertle*, 2 Am. and Eng. R. R. Cas. 162; *Railroad Co. v. Johnson*, 69

Fed. Rep. 571; Short v. Railroad Co., 13 South. Rep. 826; Chandler v. Railroad Co., 195 Mass. 589; Manning v. Railroad Co., 63 N. W. Rep. 313; Tyndal v. Railroad Co., 31 N. E. Rep. 655; Donald v. Railroad Co., 61 N. W. Rep. 971; Sorenson v. Menasha P. & P. Co., 14 N. W. Rep. 447; Smith v. Railroad Co., 42 Wis. 520; Morrison v. P. & C. Const. Co., 44 Id. 405; Geoghegan v. Steamship Co., 40 N. E. Rep. 507; Orth v. Railway Co., 50 N. W. Rep. 363; Corcoran v. Railroad Co., 12 Am. and Eng. R. R. Cas. 226; Stager v. Railroad Co., 119 Pa. St. 70; Redmond v. Lumber Co., 55 N. W. Rep. 1005.

There is no liability on the part of defendant company, as Donohue, the pit boss, and the fire bosses, Deighton and Ray, and every other employee and laborer in the mine were all fellow servants of plaintiff's intestate, Duggan only representing defendant as its general superintendent. Coulson v. Leonard, 77 Fed. Rep. 539; Coal Co. v. Johnson, 56 Id. 810; Martin v. Railroad Co., 166 U. S. 399; Steamship Co. v. Merchant, 133 Id. 375; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 438; Mining Co. v. Kitts, 3 N. W. Rep. 240; Morgan v. Coal Co., 34 Pac. Rep. 153; Bennett v. Iron Co., Id. 63; Jones v. Granite Mills, 126 Mass. 88; Troughear v. Coal Co., 62 Ia. 577; Peterson v. Coal and Mining Co., 50 Id. 674; McKin. on Fellow Servants, 320, note 1, 324; Ingebreghtsen v. Steamship Co., 31 Atl. Rep. 620; Alaska Mining Co. v. Whelan, 168 U. S. 89.

MILLS, C. J.—This is the second time these cases have been here for review. In these several actions damages are claimed by the plaintiff as administratrix, against the defendant, for the death of her husband, Henry Deserant, and her sons, Jules Deserant and Henry Deserant, Jr., by an explosion which occurred in the "White Ash Mine" on Wednesday, February 27, 1895, at about 10:45 a. m.

For the purpose of the trial, the three cases were consolidated by order of the court below and were also heard in this court in the same manner.

The declarations charge negligence in various ways, but on the trial no proof other than circumstantial was offered to show what was the cause of the explosion, or where it began; in the language of the learned judge who wrote the opinion when this case was last before this court, "It appears that, by this explosion, all the employees, 23 in number, who were at the time in the fourth left entry (except those in what was called the 'plane') were killed, and therefore all evidence to show how the explosion occurred, and where was its initial point, is necessarily circumstantial." *Cerrillos Coal Railroad Co. v. Deserant*, 49 Pac. 807.

It is unnecessary for us to go into the particulars of the accident or show the workings of the mine, as they are sufficiently set out in the case of *Cerrillos Coal Railroad Co. v. Deserant*, supra, heretofore reported. The only substantial difference in the evidence is that on the former trial, it was testified that the body of Kelly was found in the upper cross-cut, between rooms 8 and 9 and the body of Flick was found on the railroad track in room number 8 above the cross-cut, while in the present case it is shown by the testimony of Kelly, one of the witnesses for the plaintiff, that the bodies of Kelly, Flick and Donohue, were found within a few feet of each other.

The theory of the prosecution as to the cause of the explosion is the same now as then, to wit: that owing to an accumulation of water previous to the explosion, in a low place

INJURY to employee: burden of proof. in the fourth left air course, a sufficient quantity of pure air was not going to the face of the workings, in the fourth left entry to remove and expel the noxious gases; that Kelly and

Flick, who were company men, that is, men who were paid by the day and not according to what work they did, acting under instructions from Donohue, the day pit-boss, went with him or by his direction into room 8, to remove a railroad track, carrying naked lights, and that such lights set fire to the gas which had accumulated there by reason of the insufficiency of air, and caused the explosion.

This theory is purely speculative and is not supported by the evidence. It can not be positively proved what was the initial point of the explosion, or what caused it. In fact, the evidence goes to show, from measurements taken at various times by the superintendent of the mine, the pit-boss and the United States inspector, that sufficient air was going through the fourth air course and mine to make it safe. Indeed, the evidence goes further and shows that after the explosion and on the day of the investigation by the coroner's jury, and while much of the debris caused by the explosion was still in the fourth left air course, a sufficiency of air was passing through it, over the water and debris, through the low place, which is claimed by the plaintiff to have been obstructed by water, for the proper ventilation of the entry and its rooms and the explosion of all harmful gases and for the men and animals working there at the time of the explosion. There is no evidence that the condition of the fourth left air course was the direct or proximate cause of the explosion, and for the plaintiff to recover, this must be proved by a preponderance of evidence.

That Flick, Kelly and Donohue, were fellow servants of the deceased, can not be questioned. It is true that Donohue was an employee of a higher grade than either Kelly, Flick or the deceased, but still he was a fellow servant, this has been too often decided to need to be enlarged upon here. *A. T. & S. F. R. R. Co. v. Martin*, 7 N. M. 158; *Martin v. A. T. & S. F. R. R. Co.*, 166 U. S. 399; *Alaska Mng. Co. v. Whalen*, 168 U. S. 86.

If, therefore, the contention of the plaintiff is true that the explosion was caused by Kelly and Flick, by the order of Donohue, or by all three going into room number 8, where there was an accumulation of gas, with a naked light, over the danger signal (although as before stated, that this was the cause of the explosion is purely speculative) and causing it to ignite, the plaintiff can not recover, as the accident was the result of the negligence of a co-employee or fellow servant.

This case is governed by *A. T. & S. F. R. R. Co. v. Martin*, 7 N. M. 158; *Cerrillos Coal Railroad Co. v. Deserant*, 49 Pac. Rep. 807, and by a series of decisions in the United States Supreme Court, undistinguishable in principle from this one. *Railroad Co. v. Baugh*, 149 U. S. 368; *Alaska Mng. Co. v. Whalen*, 168 U. S. 86, and cases there cited.

It is unnecessary for us to consider the objections urged to the instructions given by the court below. In our opinion they were all in favor of the plaintiff, as the court should have granted the motion of the defendant and instructed the jury to find the defendant not guilty.

There is no error in the judgment of the court below, and it is therefore affirmed.

McFie, Parker, Crumpacker and Leland, JJ., concur.

[No. 770. December 19, 1898.]

D. E. BEARUP et al., Plaintiffs in Error, v. JOHN E. COFFEY, Defendant in Error.

SYLLABUS BY THE COURT.

SECURITY FOR COSTS.—Where a plaintiff makes the oath required by section 2893 of the Compiled Laws of New Mexico, 1897, after suit instituted and prior to the time within which he is ruled to give security for costs, it is error for the court to abate the cause for failure to give such security, the oath, standing in the stead of the cost bond, being sufficient answer to the rule.

Error, from a judgment of abatement, to the Fifth Judicial District Court, Socorro County. Reversed, with directions.

The facts are stated in the opinion of the court.

H. M. DOUGHERTY for plaintiffs in error.

The right of demanding a bond for costs or, in fact, the payment of costs, is purely a matter of statute. *Price v. Garland*, 28 Pac. Rep. (N. M.) 182; 4 Am. and Eng. Ency. of

Law 324; In re Almus, 3 Dem. (N. Y.) 358; Gordon v. Allison, 9 Ia. 317; 74 Am. Dec. 353; Comp. Laws, sec. 1844.

S. ALEXANDER for defendant in error.

CRUMPACKER, J.—This is an action in ejectment, brought by one Dennis E. Bearup and his wife, Maud Bearup, against John E. Coffey, for the recovery of certain mining grounds described in the declaration.

The plaintiffs in error were duly ruled on the twenty-eighth day of January, 1897, which was during a regular term of the district court of the Fifth judicial district of the territory of New Mexico within and for the county of Socorro, to give a bond for costs in the sum of five hundred dollars in said cause within sixty days from and after the date of said order. Thereafter, on March 6, 1897, there was made and entered in said district court an order extending the time to file bond for costs in this cause to the first day of April, 1897; on March 29, 1897, there was filed in the office of the clerk of said court by plaintiffs in error an affidavit of poverty in conformity with the statute; on May 10, 1897, said court entered judgment abating said cause for failure to give bond for costs; on October 8, 1897, plaintiffs in error filed a motion to set aside the judgment of abatement; on November 10, 1897, the court overruled said motion and on April 30, 1898, the cause was brought into this court by writ of error.

Each of the alleged errors complained of grows out of the court's ruling in sustaining the motion of defendant in error to abate the cause for failure of plaintiffs in error to give security for costs, and the adjudication of abatement of the cause. Where, as in this case, the record shows the making by plaintiffs in error, within the time by which they were ruled to give security for costs, of a sufficient oath that they were too poor to pay costs, the material question is whether or not such an oath is an answer to the rule? It is solvable by the construction of the statutes involved, sections 2892 and 2893 of the Compiled Laws of 1897 (originally enacted as

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sections 47 and 48 of the act of July 12, 1851), which read as follows:

Sec. 2892. "In all cases the plaintiff, on motion of any person interested in the suit or costs, may be ruled to give security for costs, and in case he shall fail to do so, on or before the first day of next term after such rule, the cause shall abate."

Sec. 2893. "If any person wishing to institute a suit, or having done so, shall make oath that he is too poor to pay costs, he shall have any and all process of the court free of charge."

These laws, sequent sections of one enactment, tested by the accepted principles of construction reflect light upon each other and are readily harmonized; they evince the legislative intent clearly to be that the courts of justice shall be open to every person, rich or poor, who has suffered a legal injury to his lands, goods, person or reputation. Indeed, any other construction would render nugatory a beneficent law. Given, then the oath required by section 2893, the statute is mandatory, and by virtue thereof, plaintiffs in error were secure in their right to sue in forma pauperis as well after as before the institution of their suit; and such an oath, standing in the stead of a cost bond, was a sufficient answer in this case to the rule for security for costs. 73 Tex. 568; Am. St. Rep. 796.

The assignment of errors we find well predicated, and the cause is reversed with directions to the court below to set aside its judgment of abatement, and to proceed in accordance with the views here expressed.

Mills, C. J., and Parker, J., concur; Leland, J., did not participate in this decision; McFie, J., having been counsel in this case did not sit.

[No. 758. February 22, 1899].

J. FRED LOHMAN et al., Plaintiffs in Error, v. WILLIAM
W. COX et al., Defendants in Error.

SYLLABUS BY THE COURT.

DECREE—APPEALABLE ORDER—DEFAULT JUDGMENT.—1.—A decree under a bill for the sale of mortgaged property ordering payment of a specific sum of money to plaintiffs, that a master or trustee sell the premises, and permitting the case to pend in the court awaiting the master's report, is a final decree which may be appealed from.

2.—Defendants in a suit at law or in equity have the whole of the last rule day within which to plead, and a default judgment taken prior to the expiration of the whole of that day is void.

Error, from a decree for complainants, to the Fifth Judicial District Court, Socorro County. Reversed and remanded.

The facts are stated in the opinion of the court.

CATRON & GARTNER and J. F. BONHAM for plaintiffs in error.

We insist that the decree was final as between complainants and defendants as to all the property, in any event final as to the personalty. *Potter v. Beal*, 5 U. S. App. 83; *Grant v. Insurance Co.*, 106 U. S. 431; *Forgay v. Conrad*, 6 How. (U. S.) 201; *Thompson v. Dean*, 7 Wall. 342; *Railroad v. Bradley*, Id. 575; *Grant v. East Co.*, 2 U. S. App. 182; *Central Trust Co. v. Grant*, 135 U. S. 221; *Farmers Loan & Trust Co.*, 129 Id. 213; *Blossom v. Railroad Co.*, 1 Wall. 655; *Fosdick v. Shawl*, 99 Id. 235; *Williams v. Morgan*, 111 Id. 684; *Burnham v. Bowen*, Id. 776; *Whiting v. U. S. Bank*, 13 Pet. 15; *Ray v. Law*, 3 Cranch 179; *Brush Co. v. California Co.*, 7 U. S. App. 527; *Terry v. Sharon*, 131 U. S. 46; *Bronson v. Railroad Co.*, 2 Black 529; *Trustees v. Greenough*, 105 U. S. 527; *Central Trust Co. v. Hiawasse Co.*, 2 U. S. App.; *Hill v. Chicago Co.*, 140 U. S. 54; *Prescott R'y Co. v. McCook*, 51

U. S. App. 601, and citations. See, also, *Tucker v. Yell*, 25 Ark. 429; *Lewis v. Campo*, 14 Mich. 459.

A decree or order directing possessory right, on a preliminary inquiry, is appealable as final. Such orders or decrees are illegal and void. *Tawas R. Co. v. Judge*, 44 Mich. 482; *People v. Simonson*, 10 Id. 335; *People v. Judge*, 31 Id. 456; *Selling v. Johnson*, 25 Id. 489; *McCombs v. Merryhew*, 40 Id. 721; *Arnold v. Bright*, 41 Id. 207; *People v. Jones*, 33 Id. 303; *Maxfield v. Freeman*, 39 Id. 65; *Merril v. Andrews*, 4 Tex. 200; *Dodge v. Alice*, 27 Minn. 381. See, also, *Barr v. Briggs*, 22 Mich. 207; *Kirby v. Ingersoll*, 1 Dougl. 477; *Callaghan v. Shaw*, 19 Ia. 183; *Thomson v. Pickel*, 20 Ia. 490; *Oatman v. Bond*, 15 Wis. 20; *In re Fleming*, 16 Id. 75; *Canal Co. v. Beers*, 1 Black (U. S.) 54; *State v. Northern R. Co.*, 18 Md. 193; *Thompson's Succession*, 14 La. Ann. 810; *Blake v. Blake*, 80 Ill. 523; *Bank v. Rosenthal*, 33 Pac. 732.

A sentence of the court pronounced against a party without hearing him or giving him an opportunity to be heard is not entitled to the respect of any court. *Windsor v. McVeagh*, 93 U. S. 273.

S. B. NEWCOMB and H. L. WARREN for defendants in error.

No judgment or decree will be regarded as final unless all the issues of law and fact necessary to be determined are determined, and the case completely disposed of so far as the court had power to dispose of it. *Freem. on Judg.* [3 Ed.], sec. 34; *McCullom v. Eager*, 2 How. (U. S.) 32; *Craighead v. Wilson*, 18 Id. 199; *Ayers v. Carver*, 17 Id. 591; *Crawford v. Points*, 13 Id. 11; *Barnard v. Gibson*, 7 Id. 650; *Freem. on Judg.*, sec. 36, and citations. See, also, 5 Am. and Eng. Ency. of Law 373; 1 Black on Judg., sec. 24; *Mower v. Fletcher*, 114 U. S. 128; *Brown v. Swan*, 9 Pet. (U. S.) 1; *Gates v. Salmon*, 28 Cal. 320; *Peck v. Vandenberg*, 39 Id. 11; *Williamson v. Field*, 2 Barb. 281; *Wallace v. Clark*, 4 How.

Prac. 78; Sharer v. Gill, 74 Tenn. (6 Lea) 495; Pete v. McGraw, 21 Wend. 667; Hicks v. Gray, 25 Tex. 82; State University v. State Nat. Bank, 92 N. C. 651; Randall v. Hard, 19 Soth. Rep. (Ala.) 971; Graham v. Noland, 24 Ky. 328; Forbes v. Hill, Dall. Dig. 486; Reymond v. Conger, 51 Tex. 536; Ames v. Williams, 19 Soth. Rep. (Miss.) 673; Buel v. Street, 9 Johns. 443; Parsons v. Robinson, 122 U. S. 112; Elder v. McCloskey, 70 Fed. Rep. 529; Clark v. Brooks, 2 Abb. Prac. (N. S.) 385; McKeown v. Officer, 127 N. Y. 687; Butler v. Lee, 42 Id. 70; Miller v. Cook, 77 Va. 806; Beebe v. Russell, 60 U. S. 283; Talley v. Curtain, 58 Fed. Rep. 4; Ex parte Gilmer, 64 Ala. 234; Nally v. Long, 56 Md. 567.

LELAND, J.—This cause comes into this court on error to the district court in and for the county of Socorro, on change of venue from the county of Dona Ana, Third judicial district.

The record in this case discloses the following state of facts, to wit: that on or about the fourth day of June, 1892, Patrick Coghlan and Ann Coghlan, his wife, for value executed and delivered to one Numa Raymond their promissory note for \$26,795.48, to bear interest at the rate of twelve per cent per annum, and to become due in two years from date. To secure the payment of the above described promissory note the said Patrick Coghlan and Ann Coghlan, his wife, executed a trust deed for a large amount of real estate and chattel property then owned by them (which is particularly described in said trust deed), and named J. Fred Lohman therein as trustee; said trust deed fully defined the powers and duties of the trustee, and also provides that "in case of the death, resignation or removal or absence from the county of Dona Ana, or refusal or failure or inability of said party of the second part to act, then the then sheriff of the county of Dona Ana and territory of New Mexico, shall be and hereby is appointed and made successor in trust of the said party of the second part, and in such event the said lands and premises and personal property shall become vested in such new trustee and all

the powers and authority by this indenture granted to said party of the second part shall pass to and be exercised by the said successor in trust the same to all intents and purposes as if he had been made the party of the second part herein." Said trust was duly and formally accepted by said J. Fred Lohman. Said trust deed was duly filed for record in the recorder's office of Dona Ana county, New Mexico, on the sixth day of June, 1892, at — o'clock a. m. Some time after the execution of said promissory note and trust deed, and prior to July 8, 1897, said promissory note was sold and assigned by the owner Numa Raymond to William W. Cox, which assignment bears date of May 10, 1897. On the tenth day of May, 1897, William W. Cox sold and assigned to Oliver Lee and Fitzgerald Moor each one-third interest in said promissory note. On the eighth day of July, 1897, plaintiffs below filed a bill in the district court of Dona Ana county, territory of New Mexico, setting out the promissory note above described, the trust deed mentioned, and praying for an accounting on the part of the defendant, Lohman, a personal judgment against Patrick Coghlan and Ann Coghlan for balance remaining due after applying the proceeds of the sale of mortgaged property, and also praying for an injunction against defendants J. Fred Lohman, Patrick Coghlan to prevent them from interfering with the mortgaged property. J. Fred Lohman was served with process of subpoena on the eighth day of July, 1897, Patrick Coghlan and Ann Coghlan were served July 10, 1897, and the writ was returnable August 2, 1897. On the fourteenth day of July, 1897, an order to show cause why an injunction should not issue against each of the defendants named was made by the district judge. Said order was made returnable on the tenth day after the service of the order. Defendant Lohman was served July 14, 1897, and Patrick Coghlan and Ann Coghlan were served July 17, 1897. On the twenty-sixth day of July, 1897, the trial judge heard the case on the plaintiff's bill, the answer thereto by J. Fred Lohman, and the affidavits offered by the respective sides, and on the second day of August, 1897, the court rendered a

decree granting the injunction against the defendants, and ordering Patrick Garrett, the sheriff of said county, to sell all of the personal property described in the bill, and directs the time and manner in which the sale shall be made. The court made no specific finding of the amount due on the note and mortgage, but ordered \$33,000 of the purchase money paid to plaintiffs.

The decree in effect ousts Lohman from his trust, and decrees Patrick Garrett, the sheriff, to be the trustee. On the seventh day of September, 1897, defendant Lohman filed a motion or petition asking the court to set aside and vacate the aforementioned decree, which petition was not heard by the court, so far as the record shows. On the twenty-second day of September, 1897, defendants jointly filed a motion in said court asking that an appeal be granted them to the supreme court from the decree of August 2, 1897, which said motion was overruled and denied on the thirtieth day of September, 1897; wherefore defendants prosecute error in this court.

The defendants in error have filed a motion to dismiss the writ of error herein for alleged reason "that said writ of error was not taken from a final judgment or decree in this cause."

The first question to be determined in this court is the question raised by the defendants in error, as to whether the decree or judgment complained of is interlocutory or final, and this raises several kindred questions which are apparent on the face of the record. While it is stoutly contended for by

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able order.

counsel for defendants in error that the decree or judgment complained of in this case was an interlocutory decree by reason of which no appeal could be taken or error prosecuted, we are clearly of opinion that the decree was a final decree, and adjudication of the substantive rights of the parties. It is true, this decree was but partial so far as it related to the whole case, but it wholly and definitely settled the following questions for all time to come, so far as language could express it, to wit: That J. Fred Lohman, the original trustee, should be enjoined perpetually from handling or managing the prop-

erty which he was then claiming, and effectually installing Patrick Garrett into the trusteeship by ordering him to sell said property, thus putting the property entirely out of the power and control of the court or its officers. The kind of decree this is, must be determined from its substance and effect on the rights of the parties to the suit, and not from its name. The decree in effect ousts J. Fred Lohman from his trust just as effectually as if a suit had been brought in a court of equity to remove him and the same had decided adversely to him. The decree also clothes Patrick Garrett, the sheriff of the county, with plenary power as trustee to succeed J. Fred Lohman, and orders him to do all and singly the things that the deed of trust authorizes Lohman to do and perform.

In the case of *Burke v. Railway Company*, 45 O. S. 631, the court say:

“An order of the court of common pleas, overruling a motion to dissolve an injunction is an order affecting a substantial right made in a special proceeding, which may be reviewed on error by the circuit court.”

In the case at bar an injunction was granted when defendant was in court at the time and resisting its issuance. We think the above case exactly in point with the case at bar, and that the court there declared the law as it is.

In the case of *Baker v. Lehman*, Wright's Report, 522 (an Ohio case), the court say that:

“A decree under a bill for the sale of mortgaged premises, finding the amount due, ordering payment, that a master sell the premises and continuing the case for the master's report, is a final decree which may be appealed from. A decree is final which is conclusive as to the subject or object of it, which determines the rights of the parties, as to it that matter this decree is final as to the complainant's right to charge the mortgaged premises with his debt and to foreclose the mortgagor and other parties of all their equities in favor of the purchaser. An appeal after the rule would leave the decree, determining the right to sell the main matter in controversy in full operation, unchanged.”

This case seems to us in point as to whether the order was final or not. The facts are almost identical; an amount was found due, viz., \$33,000, a master was appointed; he was ordered to sell the property, and did sell it, and was ordered to pay \$33,000 of the purchase money to the plaintiffs in the suit below. The case of *Teaff v. Hewitt*, 1 Ohio St. 511-520, and the case of *Kelley v. Stanberry*, 13 Id. 408-421, strongly support the doctrine laid down in the cases from which we have quoted at some length. We are therefore of the opinion that the decree complained of by the plaintiffs in error is and was a final decree, to all intents and purposes, from which an appeal would lie. Wherefore the motion of defendants in error to dismiss plaintiff's writ of error is overruled and dismissed, and the court retains the case for decision on its merits.

The only question remaining is, was the judgment a valid or void judgment, rendered at the time and in the manner in which it was? The record in this case discloses the fact that the summons served on J. Fred Lohman, Patrick Coghlan and Ann Coghlan was made returnable on the second day of August, 1897, and the summons, or subpoena as it was then called, required each of these defendants to answer plaintiff's bill on or before August 2, 1897; the defendants were thus given by the court all of the second day of August, 1897, in which to plead, and no action on the merits of the case could be had or taken until August 3, 1897. Between the date of the service of this process of the court and the answer day, August 2, 1897, defendants were each served with a notice returnable at an earlier day than August 2, 1897, requiring them to appear in the same court and show cause why an injunction should not issue against each of them, which hearing was had on the twenty-sixth day of July, 1897, and before defendants had filed their answer to plaintiff's bill, and before their time to plead had expired; the judgment of the court in the matter of the injunction, together with the remainder of the decree,

DEFAULT judgment.

was entered of record on August 2, 1897. The court at this hearing did not stop when the injunction branch of the case was disposed of, but in effect went on and in effect rendered an absolute decree of foreclosure, and appointed a master and ordered the property sold, and, as before determined, rendered a final decree.

In the case of *Lyon v. Randal*, 1 W. L. J. 396, the court says "A judgment rendered prematurely is void."

In the case of *Williamson v. Nicklin et al.*, 34 Ohio St. 123, the court says:

"A judgment rendered by default, before the expiration of the day named in the summons for answer, may be reversed on error, and such rendition is not a mistake, neglect or omission of the clerk within the meaning of sections 528 and 529 of the civil code."

The court further says in this case that:

"From these provisions it is manifest that this case never stood for trial in the court of common pleas; that it had no place on the trial docket; that as the last day of an answer had not expired it could rightly have no place on that docket; that the provisions invoked by the plaintiff in error as to the rendition of the judgment before the case stood for trial, have relation to cases in which the day for answer has expired; and that to render judgment under the circumstances disclosed in this record was not merely an irregularity, to be only corrected by motion in the court of original jurisdiction, but an error to correct which the jurisdiction of the district court was properly invoked."

While the above case was decided wholly on the question of a default judgment taken before answer day, it establishes a principle that applies with great force to the case at bar, and we think a controlling principle. The defendants were called into the court below on an order served on them, to show cause why an injunction should not issue against them, and they responded to that notice on the twenty-sixth day of July, 1897, according to the terms of the order, for the purpose of

showing cause why such injunction should not issue, and a hearing was had, as the record discloses, on affidavits and counter-affidavits on the question solely as to whether such injunction should issue or not; the court reserved its decision till August 2, 1897, when it decided not only the question before it on the twenty-sixth day of July, 1897, to wit, the injunction question, but went on in the same decree and treated the defendants as in default for aught the record shows, and rendered a final decree on a part of the merits of the suit, a part of the suit in which no issues were made up, answer day had not expired, and without any trial as to that branch of the case. The order to show cause why an injunction should not issue was purely ancillary to the suit proper and could of course be heard at any time by the court after notice to the parties; this hearing was had and the court had no question matured for decision in the case that could be lawfully decided prior to August 3, 1897, except the question of the granting of an injunction. Each of these defendants had all of August 2, 1897, until midnight of that day, in which to answer or demur, and any judgment rendered prior to that date touching the merits of the suit was and is void.

While the decree complained of recites that the hearing was had on the plaintiffs' bill, the answer thereto of J. Fred Lohman and affidavits, the record disclosed the fact that J. Fred Lohman did not file his answer to the bill until the eighth day of August, 1897, which would have made it impossible for the court to have considered such answer on the twenty-sixth day of July, 1897. We therefore are compelled to infer from the record, as a whole, that the answer alluded to by the court in its decree was J. Fred Lohman's answer to the order to show cause why an injunction should not issue, and not the answer proper to the bill of plaintiff.

From the record before us the case stands as a default judgment rendered by the court, rendered before the time within which to plead had expired, and therefore a premature judgment.

Said decree and judgment is reversed and the cause is remanded to the district court with directions to grant a new trial.

Mills, C. J., and Crumpacker, J., concur; McFie and Parker, JJ., did not sit in this case, having been of counsel.

[No. 780. February 22, 1899.]

THE MOUNTAIN ELECTRIC COMPANY, Plaintiff and Appellant, v. GEORGE H. MILES et al., Defendants and Appellees.

SYLLABUS BY THE COURT.

- MECHANIC'S LIEN—PROPERTY SUBJECT TO—WAIVER—COLLATERAL SECURITY.**—1. A person who is entitled to a mechanic's lien by reason of material furnished or work done is entitled to a lien on the whole of the building constructed or improved, together with so much of the lot or lots on which the building so constructed or improved stands, as may be necessary for the full use and enjoyment of the property.
2. The acceptance of a promissory note by the contractor from the debtor, which promissory note falls due before the expiration of the statutory period within which such lien may be foreclosed, does not impair the contractor's lien nor his right to such lien.
3. The taking of such promissory note by the contractor from the debtor is not a taking of collateral security in the legal sense of the phrase "collateral security."

Appeal, from a judgment for defendants, from the Second Judicial District Court, Bernalillo County. Reversed and remanded.

The facts are stated in the opinion of the court.

JOHNSTON & FINICAL and A. B. McMILLEN for appellant.

The court below, in effect, held that the dynamo alone is the only part of an electric light plant for which a lien will

lie. This is error. Comp. Laws, 1884, sec. 1522; Phil. on Mech. Liens [3 Ed.], sec. 200; Fetchet v. Drake, 12 Pac. Rep. 694; Hughes v. Electric Light, etc., Co., 32 Atl. Rep. 69; Improvement Co. v. Electric Light Co., 12 S. W. Rep. (Tex.) 489; Thompson on Electricity, sec. 516; Forbes v. Electric Light Co., 23 Pac. Rep. (Ore.) 670; Lumber Co. v. Marion, etc., 29 Id. (Kan.) 476.

Our mechanic's lien law being remedial in its nature and equitable in its enforcement is to be liberally construed in favor of claimants. Ford v. Springer Land Ass'n, 8 N. M. 37; Springer Land Ass'n v. Ford, 18 Sup. Ct. Rep. 170.

NEILL B. FIELD for appellees, Rosalia Armijo and Josefa Armijo.

The machinery was not used in the Armijo house, but was put in a house erected specially for it on the rear end of lots four and five. Hughes v. Power Co., 53 N. J. Eq. 435; Cowan v. Plate Glass Co., 184 Pa. St. 16; McDonald v. Lumber Co., 28 Minn. 262.

The fact the dynamo was actually used to furnish light for the Armijo hotel adds nothing to the appellant's right. Burns v. Sewell, 48 Minn. 425; Hickey v. Collon, 47 Id. 565; Bank v. Rockaway Co., 14 N. J. Eq. 189; Steel Co. v. Refining Co., 146 Pa. St. 4; Mechanics' Co. v. Denver Hotel Co., 39 Pac. Rep. 1073; Esslinger v. Huebler, 22 Wis. 632; Lee & Jameson v. Hoyt, 101 Ia. 101; Small v. Foley, 47 Pac. Rep. 64.

Appellant took collateral security for its claim. This precludes the claim of lien. Comp. Laws, 1897, sec. 2235. The section originally enacted was but declaratory of an existing principle of law. Cortesy v. Territory, 7 N. M. 94; Ford v. Ford, 143 Mass. 577; Railroad Co. v. United States, 127 U. S. 406; Harrison, etc., Co. v. Water Co., 25 Fed. Rep. 170; Same v. Same, 23 Id. 13; Grant v. Strong, 18 Wall. 623; Kinzey v. Thomas, 28 Ill. 502; Clark v. Moore, 64 Id. 279; Coal Co. v. Mfg. Co., 138 Id. 207; Little v. Vredenburg, 16

Ill. App. 189; Willison v. Douglass, 66 Md. 99; Ehlers v. Elder, 51 Miss. 499; Bailey v. Adams, 14 Wend. 201.

LELAND, J.—This cause comes into this court on appeal from the district court of Bernalillo county. This was an action to enforce or foreclose a mechanic's lien on certain property in the city of Albuquerque. A brief statement of this case is as follows: On or about December 23, 1891, one George H. Miles was engaged in conducting a hotel business in a building owned by the "Armijo heirs," and situate in said city of Albuquerque. Said Miles was a tenant. Said hotel building was situate on lots numbered 1, 2, 3, 4 and 5 of block 17, in the city of Albuquerque. On or about said twenty-third day of December, 1891, said Miles entered into a contract with the Mountain Electric Company, a Colorado corporation, for the purchase and delivery at Albuquerque of an electric light plant, to be paid for when said plant was installed and tested. Said company fulfilled their part of the contract by the delivery of the plant proper and necessary attachments for the same. Said Electric Light Plant was installed on the lots named above. Said Miles failed to pay for the purchase at the time agreed, and an extension of time was granted by the company to said Miles; finally a promissory note for the amount due was taken by the company from said Miles. Said company perfected and filed in the proper office a mechanics' lien on the property heretofore described for the amount of the debt due it; suit to enforce this lien was brought in the district court of Bernalillo county, and the court decided said cause against the complainant herein, and to reverse said judgment appeal is prosecuted in this court.

In view of the fact that this case has been so vigorously contested, and such elaborate brief filed by both counsel, we have given a great deal of time to the investigation of the questions raised in this case. In the examination and consideration of this case we have considered all letters and telegrams mentioned in the record and contended for by counsel for defendants below as in evidence,

and treated the record as full and complete in this respect. Having considered this case in the light of all the evidence disclosed by the record, as well as the telegrams about which there was some contention, the contention of counsel for defendants under the second point of this brief need not be considered in this opinion.

The third point contended for in brief of counsel for defendants, that "the contract proved, if any contract is proved, was for the sale of machinery in the open market, not for any particular building," we think untenable, because the testimony of witness Charles F. Lecombe, president of the company, Moses L. Stearns, and its salesman Thomas B. Stearns and J. W. Stearns, Jr., when construed together with the declarations made by George H. Miles as proven, satisfies us fully that the company knew the purposes for which they were furnishing this machinery, etc., and that George H. Miles purchased the electric machinery and fixtures for the Armijo Hotel, expecting to sell enough light in the market to enable him to light the hotel free of cost; and this testimony conclusively proves that the Mountain Electric Company believed and understood at the time that they were selling and furnishing this plant and fixtures for the Armijo hotel in the city of Albuquerque. Witness Lecombe's testimony is clearly admissible and is undisputed. The evidence of this transaction clearly places this company in a position at this stage of the case to claim all the rights and benefits that inure to contractors under section 2217 of the Compiled Laws of New Mexico. The contention of counsel for the defendants that "The dynamo, etc., was sold upon the faith of the telegram from the First National Bank, and not to be used in the Armijo Hotel or any other particular building," is not sustained by the evidence, especially as to where said machinery, etc., was to be used. The evidence shows that this telegram was sent by the bank at the request of Miles, he using the bank as a reference. This telegram probably strengthened the credit of Miles with the company; it could do no more; it does not guarantee payment, nor in any way known to the law become liable for the debt, default or miscarriage of Miles.

This telegram evidences but one fact, to wit: that they acted as a business reference for Miles only at Miles' request in this one transaction. The fourth contention of counsel for defendants that "the claim of lien was not perfected within the time allowed by law" is not sustained by the evidence. This claim had to be perfected within sixty days after the furnishing of the materials. The company shipped various furnishings from time to time to Miles, after the date of the first shipment, all being necessary to put the electric plant in running order, so it could be tested, and the evidence is sufficiently clear that shipments of material were made as late as the middle of March, 1892, and the lien being perfected on May 5, 1892, was within the statutory limit. See section 2221 of the Compiled Laws. If the lien is perfected within the statutory period after the last item is furnished or work done, it is a clear compliance with the terms and spirit of the law. This law was made to protect laborers and materialmen and should be liberally constructed. The fifth contention of counsel for appellees that "the machinery was not used in the Armijo House, but was put in a house erected specially for it on the rear end of lots 4 and 5" is in violation of the spirit and intent of the mechanics' lien law. All persons familiar with electric light plants and their many appliances must readily see that the placing of the machinery in a convenient place on the premises, and the wiring of all the rooms of the building, is necessary to a full and complete use and enjoyment of such an improvement to the property. The fact that the hotel building covered a portion of all the five lots named would, as a matter of law, subject so much of the lots to the liability of this lien, as would be necessary for a full use and enjoyment of the property; the fact that the engine and dynamo were placed in a building separate from the hotel, but on some of the same lots, does not alter the law of the case. In this case the whole of the lots are evidently necessary to the enjoyment of the property.

MECHANIC'S lien:
property subject
to.

The sixth contention of counsel in his brief for appellees seems to us untenable, the contention being that "the fact that the dynamo was actually used to furnish light for the Armijo Hotel adds nothing to the appellant's rights." We are satisfied from the evidence, including all telegrams and letters sent during the time of this trade, beyond question that the plaintiff and defendant George H. Miles both knew that an electric lighting plant was being bought for the Armijo Hotel. The mechanics' lien law does not create liens. It is simply enabling in its nature, and certain persons therein described may by their own acts perfect a lien in their own behalf, pursuant to the provisions of the law. The fact whether the dynamo and fixtures in question were or were not used to repair and improve the Armijo Hotel is one of the vital facts in this case, without the existence of which the whole case must fall. The fact that the material furnished was to be used for the purpose for which it was used is sufficiently proved by oral evidence of witnesses, telegrams and letters sent and received by the parties to the contract.

The seventh contention in brief of counsel for appellees "That there is no evidence of a contract such as is necessary to support appellant's lien," has, in fact, practically been settled in a former part of this opinion. The evidence in the case clearly convinces us that there was such a contract between the Mountain Electric Company and George H. Miles as would entitle the plaintiff below to have its statutory mechanics' lien.

The eighth contention of counsel for appellees that "There is no support in the evidence for the master's finding that this plant was furnished and erected with the knowledge and consent of appellees," can not be maintained, because three witnesses testify to the fact that appellees were about and in the building while the repairs were being made, and one witness testifies that appellees were specially shown the improvements throughout the hotel by a Mr. Chaves. They saw these valuable and costly improvements being made and uttered not a word nor indicated to anyone to stop, or that they would not consent or allow themselves to be made responsible.

“Having remained silent when they should have spoken, now when they would speak they shall not speak.”

The ninth contention of counsel for appellees that “the master found and the court confirmed the finding, that appellant took collateral security for its claim. This

WAIVER: collateral security. precludes the claim of lien.” We think both the master and the court erred in this, as the

receiving of a promissory note by the person in whose favor a lien exists from the person to whom he furnished the material is in no sense collateral security, and the taking of such promissory note, which, as this case now stands on the record, was no more than the taking of a memorial of the debt. That such taking of a promissory note does not impair the right to the lien is borne out by the following cases cited from many states: *Aiken v. Steamboat Fannie Barker*, 40 Mo. 257; *Bayard v. Nordyke & Marmon Co.*, 25 Kan. 155; *Steamboat Charlotte v. Kingsland*, 9 Mo. 67; *Clement v. Newton*, 78 Ill. 427; *Morrison v. Steamboat Laura*, 40 Mo. 260; *Dane v. Clinton*, 2 Utah, 417; *Bailey v. Hull*, 11 Wis. 289; *Wheeler v. Schroeder*, 4 R. I. 383; *Hawley v. Warde*, 4 Greed (Iowa), 36; *Kingsley v. Buchanan*, 5 Watts (Pa.) 118.

A distinction, however, is made where a promissory note is given in “payment and there is affirmative proof before the court showing that such note was given in payment. In the case at bar no evidence of that kind appears on the record. In volume 15 of the *Encyclopedia of Law*, page 105, we find this doctrine laid down, to wit: “The acceptance of a promissory note is not a waiver of a mechanic’s lien, although the note may have been discounted at the bank, if the note can be delivered up at the trial and the payee may prosecute the suit to the use of his assignee.”

In the state of Iowa, under a statute similar to ours, which reads as follows, to wit: “No person is entitled to a mechanic’s lien who takes collateral security on the same contract.” The supreme court of Iowa held that “The taking of a mortgage from the debtor upon the same property covered by the lien and for the same debt is not taking of collateral

security on the same contract." See *Gilcrest v. Gottschalk*, 39 Iowa, 311, and *Mervin v. Sherman*, 9 Iowa, 331.

The judgment of the district court is therefore reversed, and this cause is remanded to the district court of Bernalillo county, and said court is directed to dispose of said case in accordance with the law as declared in this opinion.

Mills, C. J., Parker, McFie and Crumpacker, JJ., concur.

[No. 817. February 27, 1899.]

JAMES F. HAYNES et al., Appellants, v. UNITED STATES OF AMERICA, Appellee.

SYLLABUS BY THE COURT.

CRIMINAL LAW—APPEAL—TRANSCRIPT—DEFECTS IN INDICTMENT—AIDER BY PLEA—CONSOLIDATION.—1. In appeals in criminal cases it is necessary to file in the office of the clerk of the supreme court at least ten days before the first day of the court to which such appeal is returnable, a transcript of the record and proceedings. A district judge signing and sealing a bill of exceptions at a later date than authorized by the statute, exceeds his authority, and, on motion, the bill of exceptions will be stricken from the record.

2.—Formal defects in indictments are cured by plea and trial. By failing to demur or moving to quash and, if overruled, saving an exception, on appeal defendants are estopped from raising objections to the sufficiency of an indictment which does not render it or any judgment based thereon void.

3.—Separate indictments against the same person may be consolidated where they grow out of the same transaction, and if defendants do not raise objections to such consolidation at the time, and ask for separate trials, they waive all right to object to such consolidation for the first time in the supreme court.

Appeal, from a judgment of the Third Judicial District Court, convicting defendants of a violation of section 5508, Rev. Stat., U. S. Affirmed, overruling in part *Territory v. Hicks*, 6 N. M. 596.

The facts are stated in the opinion of the court.

S. B. NEWCOMB and J. F. BONHAM for appellants.

Upon an indictment for conspiracy under the Indiana statute, it is necessary to specify the felony which it was proposed to commit. Stat. Ind. 2 G. & H. 455; *State v. McKinstry*, 50 Ind. 467; *Landringham v. State*, 49 Id. 186; *Scudder v. State*, 62 Id. 13; *Smith v. State*, 93 Id. 20; *Miller v. State* 79 Id. 203. See, also, 1 Arch. Cr. Pr. & Pl. 291; *United States v. Mann*, 95 U. S. 580; *United States v. Cruikshank*, 92 U. S. 543; *United States v. States*, 8 How. 41; *Pettibone v. United States*, 148 U. S. 197.

Neither the first nor the second count allege that any overt acts were done to effect the object of the conspiracy, nor that the conspirators had any knowledge that Gifford had any such right as described in the second count or that he was about to enjoy or exercise such right. *United States v. McCord*, 72 Fed. Rep. 163; *United States v. Cruikshank*, supra; *United States v. Reichert*, 32 Fed. Rep. 145; *Pettibone v. United States*, supra; *United States v. Carl*, 105 U. S. 611.

When a statute creates a new right or offense and provides specific remedies or punishments, they alone apply. Such provisions are exclusive. *Barnett v. Bank*, 98 U. S. 555. See, also, *Stafford v. Ingersoll*, 3 Hill 38; *Bank v. Land*, 57 Barb. 429; *Bank v. Dearing*, 91 U. S. 29; *United States v. Waddell*, 112 U. S. 76; *Same v. Same*, 16 Fed. Rep. 221, 222.

Where the conspiracy charged has been executed, it should be set out with the particularity of an executed transaction. *Brown v. State*, 2 Tex. App. 115; *McKee v. State*, 111 Ind. 380; *People v. Arnold*, 46 Mich. 268; 3 Russell on Crimes [9 Ed.], 151; *Rex v. Spragg*, 2 Burr 993; *Hazen v. Comm.*, 23 Pa. St. 364. See, also, *United States v. Britton*, 108 U. S. 199; *United States v. Walsh*, 5 Dill (U. S.) 61; *United States v. Hess*, 124 U. S. 486; *Comm. v. Hunt*, 4 Met.

(Mass.) 125; *Comm. v. Wallace*, 16 Gray 221; *In re Benson*, 58 Fed. Rep. 962; *Alderman v. People*, 4 Mich. 414; *Brown v. State*, 2 Tex. App. 115.

W. B. CHILDERS for the United States.

The indictment number 1209, was drawn under section 5508, Revised Statutes, United States, and alleges that Gifford was a citizen of the United States, and as such entitled to prospect for minerals, initiate, locate, establish and perfect a mining claim upon the public lands of the United States. *United States v. Patrick*, 54 Fed. Rep. 344; *United States v. Waddell*, 112 U. S. 76; U. S., Rev. Stat., sec. 2319.

The indictment 1209 charges such conspiracy fully, and the overt acts committed in pursuance thereof. Section 5508 is constitutional. *United States v. Cruikshank*, 92 U. S. 590; *Ex parte Yarbrough*, 110 Id. 651; *United States v. Waddell*, *supra*; *In re Quarles*, 158 U. S. 532; *United States v. Logan*, 144 Id. 293.

The court below was authorized in consolidating indictments 1208, 1209, by section 1024, Revised Statutes United States. *Logan v. United States*, 144 U. S., *supra*.

MILLS, C. J.—At the September term, 1897, of the United States court held in the Third judicial district of this territory, the grand jury returned two indictments numbered respectively 1208 and 1209, against Nicholas Q. Patterson, James Haynes, William Johnson, William F. Gilliland, and Wilson Kountz. Before arraignment and trial Patterson died. On February 7, 1898, counsel duly entered appearance for the surviving defendants and on the following day they were formally arraigned and plead not guilty to both indictments. On the seventeenth, on motion of the United States the two cases were consolidated and the defendants announced themselves ready for trial, which was immediately proceeded with. The trial was finally concluded on the twenty-third of February, the jury finding the defendants guilty on both indictments, and the defendants were on the ninth of March,

sentenced. On the same day a motion was filed for an appeal to the supreme court of the territory (the 1898 term of which began on the twenty-fifth day of July) and the court granted the appeal, and ordered that a supersedeas issue, staying the execution of the sentence pending the appeal, upon each of the defendants giving bail within thirty days. Nothing further was done in the case until August 15, 1898, when the bill of exceptions was signed by the judge who presided at the trial.

On the day succeeding the signing of the bill of exceptions, the United States filed a motion to strike the same from the record, on the ground that it was signed and sealed after the expiration of the time within which the court had the power to sign and seal such bill of exceptions.

CRIMINAL law:
appeal:
transcript.

This motion was argued and was sustained, and the bill of exceptions was stricken from the record, which took from our consideration the evidence introduced at the trial, all objections made, and exceptions saved, the instructions of the court to the jury, the motion for a new trial, etc. Afterwards the attorneys for the appellant filed a motion to reinstate the bill of exceptions and for a rehearing which was denied, and also a motion suggesting a diminution of the record and asking that the clerk of the Third judicial district court send up as a part of the transcript of the record the motion in arrest of judgment, the motion for a new trial, and the charge of the court. This motion was overruled except so far as the motion in arrest of judgment was concerned, which leaves us only the record proper to consider and the motion in arrest of judgment. What the striking out of a bill of exceptions takes from us has been definitely settled in this territory in the case of *Territory v. Chavez y Chavez*, 50 Pac. 324. In now considering the motion in arrest of judgment, we desire to be distinctly understood that we do not attack the principles laid down in the Chavez case or seek to lessen its force. We admitted the motion because it only applies and touches upon what we should in any event have had to consider, to wit, the validity

of the indictments and the errors that may appear in the record proper.

The reason which prompted us to sustain the motion of the United States and strike the bill of exceptions from the record is as follows:

The appeal was taken under the provisions of section 3140 of the Compiled Laws of 1897. This statute was originally a part of the Kearny Code, and the present section in the Compiled Laws is identical with the original, except that the word "superior" which appears in the Kearny Code is changed to the word "supreme." The part of the section which it is necessary for us to consider, reads:

"All appeals taken thirty days before the first day of the next term of the supreme court shall be tried at that term, and appeals, taken in less than thirty days before the first day of such term, shall be returnable to the next term thereafter; the appellant shall file in the office of the clerk of the supreme court, at least ten days before the first day of such court to which the appeal is returnable, a perfect transcript of the record and proceedings in the case. If he fail to do so, the appellee may produce in court such transcript, and if it appear thereby that an appeal has been allowed in the cause, the court shall affirm the judgment, unless good cause can be shown to the contrary."

It will be observed that the motion granting the appeal was allowed on the ninth day of March, 1898, which was more than four months before the convening of the supreme court to which the appeal was taken, and according to the section above quoted the appellant had to file in the office of the clerk of the supreme court, at least ten days before the first day of such court to which the appeal was returnable, a perfect transcript of the record and proceedings in the case (i. e., in this case, ten days before July 25, 1898). This court in the case of *Territory v. Hicks*, 6 N. M. 596, held that section 2189 of the Compiled Laws of 1884, now section 3140, of the Compiled Laws of 1887, does not apply to criminal cases. We think that this holding was error, and to

that extent this case is overruled, and we hold that this section is mandatory, and that the district judge exceeded his authority when he signed and sealed the bill of exceptions at a later date than the statute by its terms permitted. Doubtless the learned judge had his own misgivings as to his right to sign at the very moment when he was affixing his name to the bill of exceptions, but the desire to grant everyone who wishes it, an appeal, is or should be strong in the bosom of any trial judge, and as the section in question had never been construed by this court, we think that he was right in signing the bill of exceptions as requested and giving the accused every opportunity to try and clear themselves.

If, under our law, a judge can legally sign and seal a bill of exceptions three weeks after the commencement of the term of court to which the appeal is returnable, why can he not wait for three years or any other length of time that will suit his convenience and the convenience of parties appealing?

With the record thus reduced we have but two points to consider, viz.: First, are the indictments so fatally defective that the court had no jurisdiction and could not pronounce a valid judgment thereon; and second, did the court commit error in consolidating the two causes and having them tried as one? It is unnecessary for us to set out the indictments in full. We have examined them carefully and are of the opinion that they contain no counts that are fatally defective. If errors are in them they are only such as could have been taken advantage of by demurring or moving to quash, and if overruled an exception should have been saved. This was not done. The appellants by having entered pleas and gone to trial without saving any exceptions, and a verdict having been rendered and judgment entered thereon, are now estopped from raising any objection to the sufficiency of the indictments which do not render them, or any judgment based thereon, absolutely void. All minor defects and inaccuracies are cured by the plea and judgment. It is a well settled

DEFECTS in
indictment:
aided by plea.

principle of criminal law, that the verdict of a jury will be sustained when the counts are manifestly for the same cause of action, if any of the counts in an indictment sustain the verdict. 1 Bishop on Criminal Procedure, sec. 841; 2 Thompson on Trials, sec. 2, p. 641.

This leaves us only to consider whether it was proper to consolidate indictments numbered 1208 and 1209 and try them as one.

CONSOLIDATION. This consolidation was made without objection being made by the defendants. It was done on motion of the United States and immediately thereafter the the death of the defendant Patterson was suggested, and the remaining defendants expressed themselves as ready for trial. The defendants did not ask for separate trials on the two indictments, and by not objecting and, if overruled excepting, consented to the consolidation. As to this point, the record says:

“And now the said defendants, James Haynes, William Johnson, William F. Gilliland and Wilson Kountz, in their own proper persons and accompanied by James S. Fielder, Esq., their attorney, and both parties announcing themselves ready for trial, issue being joined, there comes a jury, to wit:”

By failing to save an exception the defendants lost all right to thereafter object to the consolidation of the indictments. *Logan v. U. S.*, 144 U. S. 297. And it comes with poor grace from them now to object to it for the first time. The right to consolidate indictments of this nature is also expressly given by section 1024 Revised Statutes of the United States.

In these cases the persons, acts, transactions and place were the same, and time and money was saved by the consolidation and by trying them as one. Independently of the statute they probably could have been consolidated by the court. *Logan v. U. S.*, 144 U. S. 296. .

This last mentioned case says, in speaking of the consolidation of suits, that they “might perhaps have been ordered

in the discretion of the court, to be tried together, independently of any statute on the subject."

We see no error in the judgments complained of, and the same are therefore affirmed.

Crumpacker and McFie, JJ., concur; Parker, J., having presided at the trial below did not sit.

[No. 771. February 28, 1899.]

JOHN W. SCHOFIELD, Receiver, et al., Plaintiffs in Error,
v. TERRITORY OF NEW MEXICO ex rel. AMERICAN VALLEY COMPANY, Defendant in Error.

SYLLABUS BY THE COURT.

ATTACHMENT—PLEADING—WAIVER—DAMAGES—MITIGATION—LIVE STOCK—ASSIGNMENT OF ERROR—BILL OF EXCEPTIONS—REVIEW—VERDICT—SPECIAL FINDINGS—NEW TRIAL—STATUTES—REPEAL—PROCEDURE UNDER LEVY ACT, LAWS 1889, c. 54—REMITTITUR.—1. On trials in attachment suits, when a demurrer to a portion of the answer is sustained, and a part of the answer is stricken out and the defendants except, and answer over, omitting the objectionable paragraph, they save their right to have the ruling striking out such part of the answer reviewed on final appeal of the case.

2. In suits brought to recover for actual damages done by the attachment of live stock, after the writ of attachment has been traversed and dissolved, where exemplary damages are not claimed, the defendant can not prove, in mitigation of the actual damages sustained, that he had probable cause to believe the truth of the statements contained in the affidavit on which the writ of attachment issued.
3. Assignments that error was committed in admitting "illegal and improper testimony" and in "excluding the introduction of legal and proper evidence," are too general under rule XIV of the supreme court, for us to consider.
4. It is no error to allow evidence to go to the jury showing the condition and value of live stock at times other than the day of their release, as injuries may have been sustained by reason of the attachment which are not immediately apparent; nor is there any error in allowing evidence to go to the jury showing what cattle were worth when located on and familiar with a range.

5. In civil cases since the passage of the code of civil procedure in 1897, it is not necessary to have the instructions of the court, the decision of the judge granting or refusing them, or the motion for the new trial, incorporated in a bill of exceptions, when they are in the record this court can consider them.
6. The supreme court sits only to correct errors committed on the trial of the cause below and not to pass upon the specific amount of the award of the jury in determining the case.
7. Granting or refusing a motion for a new trial rests in the sound discretion of the court, and is not alone assignable as error.
8. The code of civil procedure, passed in 1897, does not repeal the statutory authority, providing that juries shall, when required, make special findings.
9. In order to proceed under the range levy act (Ch. 54, LL. 1889), in attaching cattle running at large on the range, it is necessary that some substantial number of cattle belonging to other owners be actually rounded up and gathered before the plaintiff can avail himself of said act.
10. A trial court has power to grant a new trial in the alternative, provided that the plaintiff does not remit a portion of the damages recovered by him.

Error, from a judgment for defendant, to the Fifth Judicial District Court, Socorro County. Affirmed; Parker, J., dissenting.

The facts are stated in the opinion of the court.

CHILDERS & DOBSON for plaintiff in error.

The court erred in striking out the first paragraph of the answer of plaintiff in error. *Eames v. Kaiser*, 142 U. S. 488; *Sloan v. Loughert*, 32 Pac. Rep. 1015; *Stortz v. Finkelstein*, 66 N. W. Rep. 1020.

The court permitted evidence to go to the jury of the value of the cattle other than the market value, and at a different time from that when the damage was sustained. *Coulson v. Bank*, 54 Fed. Rep. 859; *Bates v. Clark*, 95 U. S. 209; *Railroad Co. v. Estill*, 147 U. S. 617. See, also, upon measure of damages: *Pacific Ins. v. Conard*, 1 Bald. 138, 18 Fed.

Cases; *State ex rel. v. Smith*, 31 Mo. 566; *Hamer v. Hathaway*, 33 Cal. 120; *Cattle Co. v. Mann*, 130 U. S. 69-79.

The writ of attachment for the levying of which this suit is brought, was sent to the sheriff by mail accompanied by a letter of instructions. *Donald v. Carpenter*, 27 S. W. Rep. 1053; *Lindsey v. Cope*, 44 Id. 276; *Cope v. Lindsey*, 43 Id. 29; *Sparks v. McHugh*, Id. 1045; *Brown v. Hudson*, 38 Id. 653; *Gunter v. Cobb*, 17 Id. 848. See, also, as to levy, 2 Freem. on Exec., sec. 260, and citations; *Barr v. Canon*, 69 Ia. 21.

It was purely a question of law as to whether the sheriff obeyed or disobeyed the written instructions given in levying the writ; and the court below erred in leaving the matter of construction to the jury. *Levy v. Godsby*, 3 Cranch 186; *Bliven v. Screw Co.*, 23 How. 420; *Russell v. Ely*, 2 Black 575; *Sweeney v. Easter*, 1 Wall. 166; *Walker v. Bank*, 3 How. 62.

Under statutes like ours, if the judgment can not be sustained upon the special findings, it is the duty of the court to give judgment in accordance with the special findings, if it can be done; and if not, to set aside both the special findings and the general verdict and grant a new trial. It is also the duty of the court to grant a new trial where the special findings are contradictory and inconsistent with each other as to the material issue. *Gwin v. Gwin*, 46 Pac. 295, and citations; *Ruse v. Corcoran*, 52 Cal. 495; *Lerned v. Castle*, 21 Pac. Rep. 11. See, also, *Sloss v. Allman*, 30 Pac. Rep. 574; *Lowenberg v. Rosenthal*, 22 Id. 602; *Dupont v. Storing*, 42 Mich. 492.

NEILL B. FIELD and F. W. CLANOY for defendant in error.

After the demurrer was sustained by the court below the defendants pleaded over, omitting the objectionable paragraph, and thereby waived any right to object to the ruling of the court. *Geiger v. Payne*, 69 N. W. Rep. 554; *Button v. Bank*, 105 Cal. 1; *Barrett v. Insurance Co.*, 68 N. W. Rep. 906; 6 Ency. Pl. and Prac. 359.

There was no error in sustaining this demurrer, the present action being for the recovery only of actual damages. Drake Att., sec. 173.

The denial of a motion for new trial may not be assigned as error in the courts of this territory. Buntz v. Lucero, 7 N. M. 220; Coleman v. Bell, 4 Id. 28; McClennan v. Pyeat, 50 Fed. Rep. 686; Lynch v. Grayson, 163 U. S. 468; Ayer v. Watson, 137 Id. 84; Land Co. v. Mann, 130 Id. 69; Howe v. Victoria Co., 160 Id. 303.

In the absence of any statute changing the rule the charge of the court below can not be reviewed, unless brought up by bill of exceptions. 3 Ency. Pl. and Pr. 440, and it does not help the case if the charge is actually copied into the record. Goldsburg v. May, 1 Litt. (Ky.) 254. See, also, as to what is properly a part of the record, 40 Am. and Eng. Ency. of Law, 475; Fisher v. Cockerell, 5 Pet. 254; Sargeant v. Bank, 12 How. 384; Vanderkarr v. State, 51 Ind. 95; Kirby v. Wood, 16 Me. 82; Storer v. White, 7 Mass. 448; Pierce v. Adams, 4 Id. 383; Sharp v. Daugney, 33 Cal. 12; Nichols v. Bridgeport, 27 Conn. 465; Newman v. State, 14 Wis. 430.

Where special findings can, on any reasonable hypothesis, be reconciled with the general verdict, the latter will control. Railroad v. Sumner, 30 N. E. Rep. 873; Lauderbach v. Rouch, 31 Id. 578; Railroad v. Insurance Co., 14 S. E. Rep. 237; Shafner v. Cover, 28 N. E. Rep. 871; Bloak v. Hazeltine, 29 Id. 937; Starrett v. Gault, 62 Ill. App. 209.

The court can not consider the question as to whether the damages allowed are excessive or not. Cattle Co. v. Mann, 130 U. S. 75.

MILLS, C. J.—This suit was brought on an attachment bond. The plaintiffs in error gave an attachment bond, in the statutory form, and sued out a writ of attachment against the American Valley Company. At the time of the delivery of the writ, the attorneys for Schofield wrote the sheriff of Socorro county, giving him instructions as to the course he was

to follow in levying it. That part of the instructions which is pertinent to this case, is as follows:

"I hereby instruct you to levy said writ of attachment in the first mentioned case against the American Valley Company, upon all the real estate of said company, the title to which stands of record in its name upon the record in the recorder's office of the county of Socorro, and also levy upon the cattle and other personal property standing in the name of said company by complying with the provisions of the act of the legislative assembly for 1889, page 111, entitled an act relating to the service of writs of attachment and replevin or executions on live stock. You will take possession of some of the stock belonging to said company and the balance which you can not reasonably round up, you may levy upon by filing with the clerk of the probate court a certified copy of said writ in accordance with said act."

In executing the writ the sheriff levied upon the property of the American Valley Company, and rounded up and took into his actual possession during the latter part of March and the first part of April, 1894, about one thousand head of cattle, between sixty and seventy horses, four mules, and other personal property. These he held for some days, when acting on orders of the attorneys for the plaintiff in error, he turned the cattle loose on the range and surrendered possession of the other live stock. The affidavit on which the attachment was based was traversed, and the issue thus raised came on for trial, and the court instructed the jury to find the issues in favor of the defendant, the American Valley Company. The facts developed in that case appear in the decision given in *Schofield v. American Valley Company*, which has already been decided at this term of court. After the dissolution of the attachment, the American Valley Company brought this action against Schofield, and the other sureties on the bond. A trial was had in Socorro county in January of the present year, and the jury found a verdict in favor of the American Valley Company, and assessed damages in the sum of ten thousand dollars. Special findings requested by the defend-

ant were made by the jury. The defendants below, plaintiffs in error herein, filed a motion for a new trial, and the court on March 24, 1898, granted said motion, conditionally, that the American Valley Company did not remit three thousand dollars of the damages awarded by the jury. This sum the American Valley Company did remit, and the motion for new trial was overruled, and judgment entered for the sum of seven thousand dollars. From this judgment a writ of error was sued out, and on the errors assigned the case is now before us for review.

The assignment of errors alleges error: (1) That the court erred in sustaining the demurrer of the plaintiff to the answer of the defendants to the first paragraph of the defendant's answer and striking out the same (2) that it erred in admitting illegal and improper testimony over the exception and objection of plaintiffs in error, at the trial before the jury; (3) that it erred in excluding the introduction of legal and proper evidence offered by plaintiffs in error at said trial; (4) that it erred in admitting as evidence testimony as to the value of the cattle attached under the writ, other than the difference in the market value of said cattle at the time of the attachment and the time of the release of the same; (5) that it erred in admitting as evidence, testimony as to what the cattle seized under the writ of attachment were worth to the defendant in error, instead of limiting the issue to the market value of the cattle at the time and place when and where they were seized; (6) that it erred in admitting evidence of the value of the cattle seized at times other than the date when the cattle were seized and released by the plaintiffs in said attachment suit; (7) that it erred in instructing the jury; (8) that it erred in refusing to give the instructions asked by the plaintiffs in error; (9) that the verdict was contrary to the evidence; (10) that the verdict was contrary to the law; (11) that the verdict was contrary to the law and the evidence; (12) that it erred in refusing to sustain the motion for a new trial; (13) that it erred in refusing to set aside the general verdict and render a verdict in behalf of plaintiffs in error, upon

the special findings of the jury; (14) that it erred in overruling the motion for a new trial and in permitting the defendants to enter a remittitur in the sum of \$3,000; (15) that the court should instead of permitting the entry of the remittitur for \$3,000 have granted a new trial, and (16) that the court erred in permitting counsel for the defendants in error to quote from section 2 of the act relating to the serving of writs of attachment, replevin or execution on live stock, laws of 1889, and comment thereon.

The first point which presents itself under these assignments is as to whether or not the court erred in sustaining the demurrer of the plaintiff to the first paragraph of the answer of the defendant and in striking it out. This paragraph was:

ATTACHMENT:
pleading: waiver.

“That the said attachment writ alleged to have been sued out by said declaration, was sued out by the plaintiff in said attachment suit, John W. Schofield, receiver of the Albuquerque National Bank, in a suit brought against the plaintiff, the American Valley Company, upon the ground that the defendant in said attachment suit was removing its property from the territory of New Mexico, and was sued out with probable cause or belief that such removal was for the purpose of evading the payment of the indebtedness due and owing from said defendant in said attachment suit to the plaintiff therein, in the sum of to wit: \$17,580 which said indebtedness was past due and owing to the said plaintiff therein.”

The demurrer of the defendant in error to this paragraph was that it “attempts to raise an issue which has already been disposed of in the case in which the writ of attachment was quashed, dissolved and dismissed, and which would be immaterial.”

After argument, this demurrer was sustained, and the paragraph was stricken out, defendants below excepting, and leave was given Schofield to file an amended answer, leaving out said paragraph, which he did. The amended answer was likewise demurred to, but this demurrer was overruled.

Defendant in error contends that as, after demurrer was sustained, the defendants pleaded over, omitting the objectionable paragraph, they thereby waived any right to object to the ruling of the court, as they thereby abandoned their first answer, and substituted a different one, on which they went to trial. We do not consider this point as well taken. The defendants below, having excepted to the ruling of the court in sustaining the demurrer, saved their right to have such ruling passed upon, on final appeal of the case; by answering over they did not lose such right. This point was decided in the case of *Teal v. Walker*, 111 U. S. 242, where the court says: "When a demurrer to complaint for failure to state a cause of action is overruled, the defendant by answering does not lose his right to have the judgment on the verdict reviewed for error in overruling the demurrer." Having held that the right to have the alleged error of the court below in sustaining the demurrer and striking out the first paragraph of the an-

DAMAGES: mitigation: live stock.

swer reviewed, we will now consider whether or not such striking out was proper. This was not a suit brought to recover exemplary damages.

The plaintiff only sought to recover the actual damages which it had sustained by reason of the loss resulting from the rounding up of its cattle and other live stock, during an inclement and unfavorable season of the year. In the trial of the traverse filed to the truth of the affidavit on which the attachment was based, the jury under instructions of the court, found for the defendant, which was equivalent to saying that the attachment had been improperly sued out, and that the plaintiffs had no proper grounds for attachment. It would not have mitigated the damages even if the paragraph stricken out had remained in the answer, and the defendant had proved its truth. The issue involved in this suit was as to what actual damage the plaintiff had sustained by reason of the illegal attachment which was vacated. It was not as to whether there was probable cause to believe that the American Valley Company, defendant in the attachment suit, was fraudulently removing its property from the territory of New Mexico. That

issue had already been decided in the negative. It had been finally determined, and could not come up for readjudication in the trial of this cause. At best, the paragraph stricken out was mere surplusage, and if proved could not affect the merits of this controversy. The cases cited in the briefs of the plaintiffs in error do not sustain their contention. They arose where the plaintiffs sought to obtain exemplary and not actual damages sustained by reason of an attachment, and the courts held that in such cases the defendants should be allowed to show that he did not act maliciously in suing out the attachments, so as to prevent the recovery of exemplary damages. There is no error in the sustaining of the demurrer and striking out of paragraph 1.

The second and third assignments are, we think, too general for us to consider. They do not point out errors specifically but leave it for us to examine the entire testimony and

charge to the jury, and consider each and every exception taken to any part of it. Rule 14 of this court says: "Each error relied upon shall be stated in a separate paragraph." It can not

ASSIGNMENT of
error.

be contended that these general assignments comply with this rule, and this court therefore will not consider them, as they are not well taken. (Pearce v. Strickler, heretofore decided at this term of court.)

As the fourth, fifth and sixth assignments relate to the measure of damages, we will consider them together. The

gist of these assignments is that the court had only the right to allow evidence to go to the jury showing the market value of the cattle at the time the writ of attachment was served

LIVE stock: dam-
ages.

and the cattle were taken under it, and their value when they were released, and that error was made in allowing evidence to be introduced showing what the cattle were worth to the defendant in error and the value of the cattle at times other than the date when they were seized and released in the attachment suit.

This contention of the plaintiffs in error is too narrow and if carried to its full extent it would work a hardship on the plaintiffs in this class of actions, where live stock is attached and taken into the actual possession of the officer, and suit is brought to recover for the damages actually done by such seizure. To limit a recovery which might be had to that which was apparent at the day when the live stock was released, which is the doctrine for which the plaintiffs in error contend, is not the law. Other injuries may have been sustained which are not at once apparent and which are only shown by the lapse of time. Thus in the case of *New York, etc., R. R. Co. v. Estill*, 147 U. S. 591, which is cited by the plaintiffs in error and which was a suit brought to recover for injuries sustained by cattle by reason of a collision in Ohio, the court allowed the plaintiff to prove what the value of the cattle would have been in Missouri if they had arrived there in good order and condition, and also allowed proof to go in, of the number of calves which the cows aborted by reason of the collision, and the value of the cows after such abortion. In that case, the court says, "It is further contended for the defendant that, if the proper measure of damages is the difference between the market value of the cattle in the condition in which they would have arrived, but for the negligence of the defendant, and the condition in which they did arrive, that the value must be fixed as of the time when the cattle first reached their destination, and the plaintiff could not show that subsequently some of the cattle died. It is further contended that two rules for the recovery by the plaintiffs were adopted, first, the difference between the two market values of all the cattle in the condition in which they arrived at the time, and, second, in addition thereto, the value of those which subsequently died.

"The market value of the cattle at their destination would depend upon their condition when they reached it. Proofs that the deaths subsequently resulted from injuries the cattle had received in the collision, would simply show their real condition when they reached their destination. It would not

establish any new injury or any additional damage. The plaintiffs were permitted to prove that some of the cattle had been so badly injured at the time of their delivery that they subsequently died from the effects of such injury, and, therefore, were of no value when delivered." Nor do we see any error in permitting evidence to go the jury as to what the cattle were worth when located on and familiar with a range. The driving on the range of the same number, kind and quality of new cattle as those which were rounded up and injured while held under the attachment, would not have reimbursed the defendant in error for the losses which it sustained, for such cattle would not have been accustomed to the range, and it would have cost much more to have cared for them until they were located on, and accustomed to the range, than to care for those already located there. Live stock located and running at large on the range, are very different from animals which are kept up, fed and cared for.

The seventh and eighth assignments are that the court committed error in instructions given the jury and in not giving those asked for by the plaintiff in error.

The instructions given by the judge below, in the order in which they appear in the transcript of record, are appended at the end of this decision and it will appear from them that they are not inserted in the record in the order in which they must have been given to the jury, nor do they appear to have any proper ending. We doubt that they are copied in the transcript in extenso. We also give the instructions requested by the plaintiffs in error, which were refused.

BILL of exceptions:
review.

The defendant in error contends that it is not necessary for us to pass on the instructions given or refused, as they are not properly before us, not being incorporated in and made a part of the bill of exceptions. This court held in the case of the Territory v. Chaves y Chaves, 50 Pac. 324, which was a criminal case, the decision of which involved the life of a human being, as follows:

“Fifty-six errors are assigned by the defendant relating to things done during the progress of the trial. We can not, however, pass upon these alleged errors, as there is no motion for a new trial in the bill of exceptions. It is a fundamental rule that such errors must be brought to the attention of the court below by a motion for a new trial, as an exception must be saved to the overruling of that motion, and the motion must be made matter of record by a bill of exceptions.”

Neither the instructions nor the requests for instructions in this case, nor the motion for a new trial, are in the bill of exceptions. The last request for instructions (and the request comes after the instructions were given) ends on folio 157 of the transcript. The motion for the new trial in 158 to 169, while the bill of exceptions begins on folio 187 of the transcript. The plaintiffs in error contend that it is not necessary to embody the instructions and motion for the new trial in the bill of exceptions and cites sections 2996, 2997 and 2998, of the Compiled Laws of 1897, in support of such contention. These laws were, however, passed in 1880, long before the decision in the Chaves case, *supra*, and in deciding that case the court held that they did not apply in criminal cases, nor in our opinion do they apply in civil ones; but the plaintiffs in error also claim that under sub-section 172 of the Code of Civil Procedure, passed in 1897 (Ch. 78, Laws of 1897, section 2685, sub-section 172 Compiled Laws of 1897), it is not necessary to have the instructions, and the decisions of the court granting or refusing them and the motion for the new trial, incorporated in the bill of exceptions. Part of said sub-section is as follows: “In all actions the testimony taken by a referee, the transcribed notes of the stenographer, and all motions, orders or decisions made or entered in the progress of the trial of any action shall become and be a part of the record for the purpose of having the cause reviewed by the supreme court of the territory upon appeal or writ of error, and it will not be necessary to prepare or have settled, signed or sealed any bill of exceptions in order to make any such matters a part of the record in such action.”

We think that this claim is well founded and that under the Code of Civil Procedure, now in force in this territory, it is not necessary in a civil case to have the instructions and the decision of the court granting or refusing them, and the motion for a new trial, incorporated in the bill of exceptions, but that when they are in the transcript this court can consider them.

Holding that the instructions given and refused are before us, we will now consider as to whether or not the court committed error in the instructions which were given or in those which were refused.

We have gone over them all as they appear in transcript very carefully, and think that the court gave the law as it is. The court in the charge pointed out correctly the several items of damage, and there is nothing to show that the jury made any error from not understanding the law or in applying the same to the facts presented to them for their consideration. Substantially all the law contained in the plaintiffs in error's requests, which it would have been proper for the judge to give are given in his charge. We see no error either in the charge given by the court to the jury, or in its refusal to give the instructions requested by the plaintiffs in error.

The ninth, tenth and eleventh assignments are that the verdict of the jury was contrary to the evidence, contrary to the law, and contrary to the law and evidence. This cause

VERDICT: review. comes before us to have errors occurring at the trial below corrected, and not for us to pass on the exact amount of the verdict given by the jury in determining the case. The judge in the court below who presided at the trial and the jury who saw and noted the manner and actions of the several witnesses while they were on the witness stand, could do that far better than any appellate court can do from simply reading the evidence taken. An assignment that the verdict of the jury is against the law, can not be entertained. *Brigham & Co. v. Retelsdorf*, 73 Iowa, 712; *Wood & Co. v. Hallowell et al.*, 68 Iowa, 377.

These remarks apply also to the proposition as to whether the verdict was contrary to the evidence and to the law and the evidence. As previously stated we do not consider the mere weight of evidence. The jury and the trial judge do that and if the judge who presided at the trial had thought that the verdict was not a proper one, and one which was warranted by the evidence adduced, he undoubtedly would have set it aside and have granted a new trial himself, even if the plaintiffs in error had not made the motion for such new trial. That he did not do so is strong cumulative evidence that he did not think the verdict, after remitter was made, unwarranted by the evidence adduced at the trial; in fact, his holding that he would grant the motion for the new trial, unless the defendant would remit the amount of the recovery so as to reduce the same to \$7,000 is positive proof that he considered that a judgment of such sum was warranted by the evidence.

The twelfth assignment is that the court erred in refusing to sustain the motion for a new trial. The granting or denial of such a motion rests in the sound discretion of the trial court and is not alone assignable as error in the courts of this territory or in those of the United States. In *Coleman v. Bell*, 4 N. M. 28, the court says:

“A motion for a new trial in the federal courts is a motion addressed to the discretion of the court, and the decision of the court, in granting or refusing it, alone, is not the proper subject of a bill of exceptions.”

And again in the same case the court says: “The universal rule of practice is that matters resting entirely in discretion, are not re-examinable in the court of errors.”

Numerous authorities are cited in this case in support of this proposition. The same rule has been reaffirmed in *Buntz v. Lucero*, 7 N. M. 220, and we see no good reason to change it.

Assignment 13 is that the court erred in refusing to set aside the general verdict and to render a verdict for the plaintiffs in error upon the special findings made by the jury.

The right to require special findings by the jury in trials in the district courts was specially given by statute in this territory. Chapter 45, Laws of 1889, compiled as section 3993 of the Compiled Laws of 1897. SPECIAL findings: statutes: repeal. The defendant in error claims that by the passage of the Code of Civil Procedure by the Legislature of 1897, the statutory authority provided for special findings is repealed. We can find no such repeal, and therefore hold that the statutes permitting juries to make special findings is still in force. Under the common law, also, the court had the right to require that juries give special findings in certain cases. By the statute of this territory if the special findings are inconsistent with the general verdict, "the former shall control the latter and the court shall give judgment accordingly."

The court has also the inherent power, if that can not be done, to set aside both special findings and general verdict, and order a new trial. Did these special findings conflict with the general verdict in such a manner as to require the court to set aside such general verdict and give judgment on the special findings, or to set aside both of them and order a new trial? In some of the states of the Union, it is required that in case of special requests to find, all of the cause shall thereby be submitted to the jury, but this is not the law in this territory.

The plaintiffs in error submitted to the jury eleven requests for special findings, and the jury have answered them all. These requests and the answers made by the jury are as follows, to wit:

"1. How many cattle are shown to have died and been lost in consequence of the levy of said writ? (200) Two hundred.

2. What was the value of the cattle so lost per head at the time and place where they were seized under said writ? (\$11) Eleven dollars per head.

3. How many calves were lost to the plaintiff by reason of the levy of said writ of attachment, and what were the dam-

ages sustained on account of the calves so lost? (250) Two hundred and fifty.

4. What was the difference in the market value of the cattle per head which were turned loose and redelivered to the plaintiff at the time they were levied upon and at the time they were so turned loose? (\$1.50) One dollar and fifty cents per head.

5. Were the acts of the sheriff in rounding up, seizing and holding said cattle in the pasture or corral or close herding them authorized by the plaintiff in said attachment suit? Yes.

6. Did the sheriff take reasonable and proper care of the cattle so seized and held by him under said writ of attachment? Tolerably so.

7. If the sheriff did not take reasonable and proper care of the cattle so seized and held by him under said writ, were his wrongful acts with reference to said property, or his neglect to properly care for the same, known to the plaintiff or his attorney in said attachment suit? No.

8. Was it not impossible and impracticable for the sheriff to round up, gather and take possession of one thousand head of cattle or the number he actually did round up and gather, without at the same time rounding up, and cutting out live stock belonging to other owners? Impossible.

9. Did the sheriff, in levying upon and taking into his possession of the number of cattle which he did, follow the instructions and directions given by plaintiff in said attachment suit or his attorney? Yes.

10. Did the sheriff and the men assisting him exercise due and reasonable care in the gathering and rounding up of said cattle for the purpose of holding under said writ of attachment? Tolerably so.

11. If they did not exercise due and reasonable care was their failure to do so known to or approved in any manner by the plaintiff or his attorney in said attachment suit? We think not."

The jury seem to us to have answered these questions fairly and impartially. Indeed the plaintiffs in error do not seriously contend that any of their answers are incompatible with the general verdict, except the answer to request number 8. The claim of the plaintiffs in error is that they furnished the sheriff with written instructions as to how he should proceed to levy the attachment. (A copy of such part of the instructions as is pertinent to this case is inserted in the first portion of this opinion.) What is known as the range levy act was passed in 1889, and is chapter 54 of the Session Laws of that year. It consists of five sections, of which it is only necessary for us to quote the first:

PROCEDURE under
"Levy act."

"Section 1. Hereafter whenever it shall be necessary to levy any writ of attachment, replevin or execution under the laws of this territory upon any live stock or herd of cattle that are ranging at large with other live stock or cattle over any range country, and when it would be impossible or impracticable to round up, gather or take possession of the same under such process without at the same time rounding up and cutting out the live stock belonging to other owners, then and in such case, the sheriff or other officer holding such writ, shall only take possession of such stock as he may be able to get without interfering with the live stock of other owners, and as to the balance, it shall be sufficient in order to subject them to the lien of said writ, that the officer shall file with the clerk of the probate court of the county in which the brand of such live stock is recorded, a certified copy of said writ, and immediately upon the filing thereof the clerk of the court shall note the same in the reception book of his office, and shall also note the same in red ink on the margin of the page of the book where such brand is recorded and shall properly index the process in the general and other proper indices of his office; provided that if said livestock range is in more than one county, then the officer may file a like certified copy of the writ and brand in any such county and the same shall have like binding effect as a lien upon such live stock."

Plaintiffs in error contend that under the statute it was only necessary for the sheriff to round up a very few of the cattle, such number in fact as might have been rounded up without gathering cattle belonging to other owners, and that, if he rounded up any cattle other than those claimed in the writ of attachment, then he exceeded the authority conferred upon him by the written instructions and that the sheriff, and not the principals in the attachment suit, are liable for any damages which may have resulted. The evidence shows that over a thousand head of cattle belonging to the American Valley Company were rounded up, and with them about fifty head of stock belonging to other owners were also gathered. Out of such number so rounded up, this is not a large proportion. We have very grave doubts as to whether the legislature intended that, if only four or five head of cattle in the hundred belonging to other people were rounded up, when cattle were seized on attachment, this would do away with the actual seizure of the cattle levied on, and that such levy might be made by simply filing a paper in the office of the probate clerk. We are inclined to the belief that the legislature actually intended that it would be necessary to gather such number of stock belonging to other owners as would do them some substantial injury or damage, before the prohibition under the range levy act against gathering other cattle would apply. In addition to this the evidence nowhere discloses on what day of the round-up the fifty head of cattle belonging to other owners were gathered. Nearly all of them may have been rounded up on the last day, and if such was the case it would not have justified the sheriff in releasing the cattle which he already had in his possession. We can see nothing in the replies to the several requests which is in serious conflict with the general verdict, and are of the opinion that the court would have committed error had the general verdict been set aside on account of these special findings.

The fourteenth and fifteenth assignments we will consider as one. They allege error in the alternative, because the

REMITTITUR. court allowed the verdict of the jury to stand when the plaintiff below entered a remitter of \$3,000 instead of granting a new trial. The right of the court to allow a verdict to stand when the plaintiff enters such a remitter as the court deems proper, and which in its opinion will fairly bring the amount of the judgment within the proof admits of no argument. In the case of *Arkansas Cattle Co. v. Mann*, 130 U. S. 69, which is a most instructive case, and where many authorities are cited, the court says:

“It can not be disputed that the court is within the limits when it sets aside the verdict of a jury and grants a new trial where the damages are palpably or outrageously excessive. *Ducker v. Wood*, 1 T. R. 277; *Hewlett v. Crutchley*, 5 Taunt. 277-281; authorities cited in *Sedgw. on Damages* [6 Ed.] 762, note 2. But, in considering whether a new trial should be granted upon that ground, the court necessarily determines in its own mind whether a verdict for the given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for the new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint, notwithstanding such remission, it is still open to him to show in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court, or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case.”

This leaves only the sixteenth and last assignment for us to consider. This assignment is that the court committed error in allowing counsel for the defendant in error to quote from section 2 of the act relating to writs of attachment, etc. (Ch. 54 Laws '89), and comment thereon. This assignment

is misleading, as the record does not show that counsel commented on this section. What appears and all that appears in the transcript relating to this matter is the following:

“During the argument of the case on behalf of the plaintiff by Mr. Catron, counsel quotes from section 2 of the act relating to the serving of writs of attachment, replevin or execution on live stock, Laws of 1889, as follows: ‘Upon the next round-up after such levy until such writ is satisfied, all persons coming into possession of any such live stock shall treat such officer as the owner thereof.’ Defendant objects to counsel reading such act or any part thereof to the jury, which objection is by the court overruled, and defendant then and there excepts.”

We are of course bound by the record as it appears. We can not go outside to ascertain what counsel said, if anything. No remarks or comments are in the record, so we must assume that none were made, and it can not with reason be contended that the mere reading of this section to the jury was reversible error.

We have considered all the assignments raised by the plaintiffs in error, and can find no substantial grounds for a reversal of the court below, and such judgment is therefore affirmed.

McFie, Crumpacker, and Leland, JJ., concur; Parker, J., dissents.

INSTRUCTIONS GIVEN BY THE COURT, AS APPEARING FROM THE
RECORD.

“You are instructed that while the defendants are not liable for damages which may have resulted to the horses from the use of them in rounding up the cattle, yet, if you find that in the rounding up of the horses and holding the same under said writ any of the horses died or were lost as a result of said rounding up and holding by said sheriff then the defendant would be liable for such horses so lost at the

reasonable value thereof per head at the time the same were so taken under said writ.

Gentlemen of the Jury:

This is a suit instituted by the plaintiff against the defendants to recover damages for the alleged wrongful suing out of the attachment.

You are instructed that the plaintiff is entitled to recover in this action only for the actual damages which he has sustained by reason of the levy and suing out of said writ of attachment in said cause, such damages as necessarily resulted from the suing out of the attachment damages resulting to the property by them, and the acts reasonably done by the sheriff in the execution of said writ with the reasonable expenses incurred in the defense of said attachment suit.

You are instructed that the defendants in this case are not liable in this action for any willful and abusive mistreatment of the said cattle so taken under said writ of attachment, if you should believe from the evidence said sheriff in rounding up and handling said cattle has been guilty of willful and abusive treatment of said cattle which resulted in the injury thereof, he would not be liable unless you further find from the evidence that said willful and abusive treatment of said cattle was done with the knowledge, consent or approval of the defendant Schofield or his attorney.

You are further instructed that the said sheriff was not authorized to use the horses and mules of the said plaintiff in rounding up said cattle.

Neither was the said sheriff authorized to kill and use any of the meat from the cattle for the purpose of feeding and supplying the men whom he had in charge of said cattle, and was not authorized to take and use any of the hay for the horses and mules except such as were necessary to feed and care for the horses and mules which the said sheriff took under said writ. That the said sheriff would be authorized to use the said hay and grain to feed and take care of the said horses upon which he had made said levy, and the defendants would be liable therefor; but if the said sheriff and his posse used and rode said horses, and any damage or loss resulted to said horses

from such use, then the defendant herein would not be liable therefor.

You are instructed that the plaintiff is entitled to recover in this action to the amount of reasonable attorney's fees paid or contracted to be paid by it in the defense of said issue upon the trial of said attachment proceedings, and not any general attorney's fees for the defense of said suit upon its merits.

You are further instructed that the writ of attachment placed in the hands of the sheriff commanding him to levy upon and attach so much of the goods and chattels of the said plaintiff as were sufficient to satisfy the amount mentioned in said attachment writ of about \$17,000, and the said sheriff was authorized to do such acts and things as were necessary to make a valid levy upon said property. It appears in evidence that at the time said attachment writ was so delivered to said sheriff the attorney of the defendant Schofield gave to said sheriff certain instructions in reference to said levy, as follows, to wit:

"I hereby instruct you to levy said writ of attachment in the first mentioned case (that is, the case of Schofield against the American Valley Company) upon all the real estate of said company the title to which stands of record in its name upon the records of the recorder's office of the county of Socorro, and also levy upon the cattle and other personal property standing in the name of said company by complying with the provision of the Act of the Legislative Assembly for 1889, page 111, entitled An Act relating to the service of writs of attachment and replevin in execution on live stock. You will take possession of some of the stock belonging to said company and the balance you can not reasonably round up you may levy upon by filing with the clerk of the probate court a certified copy of said writ in accordance with the said Act."

Under the law referred to in these instructions the sheriff under said writ had a right to take possession of such stock and cattle upon the range as it was practicable for him to get hold of without interfering with the stock of other persons. Under this writ and under the instructions which were given

the sheriff was authorized and directed to attach and take into his possession such of the property and cattle of the defendants in said writ as were reasonable and necessary to satisfy the writ, and he was authorized and directed under said writ and was authorized by the instructions to round up and take into his possession a portion of the cattle belonging to said company, and could take possession of such portion of said cattle as he could by the exercise of reasonable diligence round up; and if you believe from the evidence that the said sheriff, acting under said writ of attachment, and under said instructions, did go upon the range of the said company, and did round up and take possession of nine hundred or one thousand head of the cattle of the said plaintiff, and that in rounding up said cattle and in taking possession of the said cattle he exercised reasonable care, and that if while said cattle were so in his possession he exercised reasonable care in looking after and caring for the same, and if you further find from the evidence that by the acts of said sheriff in so rounding up, taking possession of and holding the said cattle in the manner stated that the same were damaged or any of them lost to the said plaintiff by reason thereof then the defendant would be liable in this action for the damages resulting from such rounding up, handling and holding of the said cattle. If any of said cattle died as a result thereof the measure of damages would be the reasonable value of such of said cattle as died, the value thereof to be fixed at the time and place and circumstances under which they were taken. If said cattle, or any of them, were injured as a result of rounding up and holding the same by said sheriff, then as to such as were so injured the measure of damages therefor would be the difference between the value of said cattle so damaged or injured at the time and place and under the circumstances which they were taken and the value thereof at the time they were returned to the plaintiff.

INSTRUCTIONS ASKED BY THE PLAINTIFFS IN ERROR, AND REFUSED
BY THE COURT, AS APPEARS FROM THE RECORD.

"1. The court instructs the jury that the plaintiff is not entitled to recover for any damages which may have been sustained by it by reason of the levy of the said writ of attachment, on account of the levying of which this suit is brought, except for actual damages it so sustained, and that the measure of the actual damages sustained, if any, on account of the injury of the property levied upon is the difference between the market value of the property at the time the writ was levied and the value of the property at the time it was released and returned to the plaintiff.

"2. The court instructs the jury that if they believe from the evidence that the defendant Schofield, through his attorney, instructed the sheriff to make a range levy upon the cattle and other live stock of the plaintiff, and the sheriff after having received the said writ and the said instructions, proceeded to round up and hold in pasture, corral or by close herding, a large number of cattle, to wit, some nine hundred or one thousand head, and took and used the horses and mules of the plaintiff in so doing, then the defendants are not liable in this action for damages, if any, for the said unauthorized action of the sheriff.

"3. The jury is further instructed that the defendants are not liable in this action for the acts of the sheriff in failing to take proper care of the property seized and levied upon by him under the writ of attachment then in his hands, unless they believe from the evidence that his failure to take proper care, and his willful acts, mistreatment or abuse of the property held by him was done with the knowledge, approval and consent of the said defendant Schofield, or his attorney.

"4. The jury are instructed that the defendants in this action are only responsible for such acts as the writ placed in the hands of the sheriff command him to do, unless they further believe from a preponderance of the evidence that the unreasonable acts claimed to have been done by said sheriff,

or his deputies, were done under the instructions or with the knowledge and consent or approval of the plaintiff in said attachment suit, or his attorney; and they are further instructed that said sheriff was not authorized in said writ to seize the horses and mules of the plaintiff, levied upon for the purpose of rounding up the cattle of the said plaintiff under said writ, and that he was not authorized to kill and use the meat of any of said cattle, or take or use any hay or any other supplies for the men engaged in rounding up said cattle and mules used in so doing.

"5. The jury are further instructed that the defendants in this action are not liable for the horses killed, or the using of the hay, or other supplies which said sheriff may have appropriated or used while engaged in serving said writ or levying upon said cattle.

"6. The court further instructs the jury that the defendants are not liable in this action for any moneys expended by the plaintiff in payment for the attendance or mileage of witnesses upon the trial of the issue of the affidavit of attachment in said attachment suit, and that the law fixes the amount of the compensation of witnesses for mileage and attendance upon the court, and the plaintiff was entitled to recover and did recover for such expenses incurred as a part of the judgment rendered in said attachment suit.

"7. The jury are further instructed that the plaintiff is not entitled to recover as a part of its damages for the wrongful suing of said attachment, attorney's fees contracted or paid subsequent to the release of the levy upon the property of said plaintiff and the return of the same to it.

"8. The jury are further instructed that while the plaintiff may be entitled to recover reasonable attorney's fees actually paid or contracted to be paid, in and about the defense of said attachment suit, still it is not entitled to recover except so much of the attorney's fees as the jury may believe from the evidence were paid or contracted to be paid for the defense of the issues upon the affidavit of attachment, and they should not take into consideration the amount of any retainer or any

fee contracted to be paid, or any portion of any fee or retainer which was paid, or contracted to be paid, for the defense of the plaintiff against the indebtedness it was sued for in said attachment suit.

“9 The jury are instructed that the writ of attachment placed in the hands of the sheriff commanding him to levy upon and attach so much of the goods and chattels of said plaintiff as was sufficient to satisfy the amount of —— dollars claimed in said writ, authorizing him to do only such acts as were necessary to make a valid levy upon such property in the absence of special instructions from the plaintiff in said attachment suit, and the defendant would only be liable for such as were necessary and proper, and it was the duty of the sheriff, while the property was so attached and while in his possession, to take reasonable care of the same, in view of the kind and character of the property so attached, and that he was not authorized to round up and close herd the cattle and other live stock of the plaintiff in any such manner as would injure them, and if the said sheriff did so round up and hold said property in such manner as to cause the same to be injured and depreciated in value, said defendants are not liable in this action for any such damage.

“The court further instructs the jury that if said sheriff or his deputies and the persons assisting him did not use due and proper care in handling, rounding up and holding said cattle under said writ of attachment, if any losses or damages did accrue to said cattle on account of the manner of handling them or the failure to use due and proper care in handling, rounding up and holding said cattle, then the defendants would not be liable for such failure, unless the same was done under the direction and approval, knowledge and consent of the plaintiff in said attachment suit.

“The jury are further instructed that in this form of action it is not sufficient for the plaintiff to show that the attachment was dissolved in order to authorize him to recover attorney's fees paid or contracted to be paid for services in securing the dissolution of the attachment, it is also necessary in such case

that the evidence should show that the plaintiff in the attachment suit had no reasonable cause for suing out the same.

“The jury are further instructed that in this action the defendants are not liable for attorney’s fees for securing the release of said cattle, which he levied upon and released, and of which the defendant in said attachment suit was not deprived of the possession at the time of the employment of his attorney and the payment of attorney’s fees, and that the value of the services should be estimated upon the basis of the value of the property which was released from actual seizure and possession of the sheriff, under the attachment writ in consequence and as a result of the attorney’s employment.

“The jury are further instructed that in this form of action it is not sufficient for the plaintiff to show that the attachment was dissolved in order to authorize him to recover attorney’s fees paid or contracted to be paid for services in securing the dissolution of the attachment, it is also necessary in such case that the evidence should show that the plaintiff in the attachment suit had no reasonable cause for suing out the same.

“The jury are further instructed that in this action the defendants are not liable for attorney’s fees for securing the release of said cattle, which he levied upon and released, and of which the defendant in said attachment suit was not deprived of the possession at the time of the employment of his attorney and the payment of attorney’s fees, and that the value of the services should be estimated upon the basis of the value of the property which was released from actual seizure and possession of the sheriff under the attachment writ in consequence and as the result of the attorney’s employment.

“The jury are instructed that there is evidence in this case tending to show that the plaintiff in the attachment suit instructed and directed the sheriff to levy said writ of attachment upon the cattle of the defendant company under and in accordance with the act of the legislative assembly of 1889, known as the range levy act, and not to round up more cattle than was reasonable in order to comply with said act.

"The court instructs you that said act provides that a levy may be made upon cattle and live stock upon a range by gathering, rounding up and taking into possession as many cattle as it is possible and practicable to round up and take possession of without interfering with the cattle of other owners. And you are instructed that if you believe from the evidence that the sheriff in rounding up necessarily interfered with and gathered and rounded up cattle belonging to other owners than the defendants in said attachment suit, which it was necessary to cut out, then said act or acts of said sheriff were in violation of the defendant in this suit, and the defendants in this suit are not liable for any damages or injuries which may have been suffered by the defendant in said attachment suit by reason of the seizure and holding of any cattle in excess of the number which the sheriff should or could have rounded up and under the said instructions and said act of the legislative assembly as above explained.

"The court instructs the jury that the writ of attachment which was placed in the hands of the sheriff and for the levy of which this suit is brought, commanded the sheriff to levy upon and seize sufficient property of the defendant named in the writ to satisfy the amount thereof, that the law required the sheriff in accordance with the command of said writ to exercise reasonable care and diligence in seizing, levying and holding and taking care of any property levied upon under the same. That it was the duty of the sheriff in executing the same to use reasonable care and diligence in the seizure and holding of the property attached by him as by law might be necessary in order to fix upon said property a valid lien in favor of the attaching auditor.

"The jury are further instructed that the law authorizes a levy upon cattle and live stock by gathering up and taking possession of so many cattle that it is possible and practicable to gather and take possession of without gathering or taking possession of or cutting out any cattle belonging to other owners than the defendant in the attachment writ.

“And if you believe from the evidence that the sheriff under said writ rounded up and gathered and held possession of more cattle than could have been gathered and rounded up without including therein cattle belonging to other owners, than the defendants in said attachment suit rounding up and holding was not the exercise of proper and reasonable care in the execution of said writ, and the defendants are not liable for any damages and injury suffered by the defendant in said attachment writ in consequence of said acts.”

[No. 761. August 28, 1899.]

THE ALLIANCE ASSURANCE COMPANY, Plaintiff in
Error, v. BARTLETT & TYLER, Defendants in Error.

SYLLABUS BY THE COURT.

GARNISHMENT—FOREIGN CORPORATION—APPEARANCE BY AGENT—PROCESS—SERVICE—INSURANCE COMPANY—ANSWER TO INTERROGATORIES—JUDGMENT—APPEAL—AFFIRMANCE—DAMAGES.—1. Where an agent of a foreign corporation on whom process can be served, enters appearance for such defendant corporation, after the period of over three years has elapsed without objection being made to such appearance, it is too late for the corporation to withdraw such appearance, unless it is shown that it had no knowledge of such appearance.

2. An insurance company, when garnished, is bound by its answer to interrogatories filed, which show the amount of money in its hands growing out of a liability for a loss by fire.

3. When garnished, a corporation can avoid all risk and liability by making a proper showing and by paying the money garnished into court to await the order of the court concerning its disposition; and when it does not do so, but appeals, when the judgment below is affirmed it is proper for the supreme court to award damages against it, under section 3142, Compiled Laws of 1897, in addition to the judgment complained of.

Error, from a judgment for plaintiffs on the answer of the garnishee to interrogatories filed, to the Second Judicial District Court, Valencia County. Affirmed, with award for damages.

The facts are stated in the opinion of the court.

SYLVESTER G. WILLIAMS and R. W. D. BRYAN for plaintiff in error.

“To charge the garnishee for a debt due defendant, it must be absolutely payable at present or in future, and not dependent on any contingency at the time of service of process.” 8 Am. and Eng. Ency. 1194, 1189; Lovejoy v. Insurance Co., 11 Fed. Rep. 63. See, also, Russell v. Clingan, 33 Miss. 535; 8 Am. and Eng. Ency., supra 1189.

A fire insurance company can not be charged with liability as garnishee while it has an option to rebuild or replace lost or damaged goods. 8 Am. and Eng. Ency. 1191, note 2; Id. 1166, 1167.

The service of process must be properly proved. The mere appearance of the garnishee will not avail. 8 Am. and Eng. Ency. 1118-1121, and notes 3, 4, p. 1120; Hebel v. Insurance Co., 33 Mich. 400.

The act authorizing proceedings against garnishees being in derogation of the common law must be strictly construed. Maynard v. Cornwell, 3 Mich. 309. See, also, Townsend v. Cass, 39 Id. 407; Drake Attach., sec. 451; Wade on Attach., secs. 336, 361, 399; Wap. Attach. 265; Shinn on Garn., secs. 485, 605, 606; Insurance Co. v. Friedman, 11 S. W. Rep. 1046.

The agency to accept service of process limits and defines the agent's power as such. It does not give him authority to enter a general appearance. Osborn v. Bank, 9 Wheat. 739; Brinkman v. Shaffer, 23 Kan. 528.

CHILDERS & DOBSON for defendants in error.

The court below properly rendered judgment against the plaintiff in error upon the answer filed by it as garnishee. Comp. Laws 1897, sec. 2711.

Twenty persons may be named as garnishees in the same writ provided each garnishee therein named is separately

served and separate interrogatories are addressed to him; and the ground that because plaintiff in error only owed one of the defendants while the suit was against both, is immaterial. *Altman, Miller & Co. v. Insurance Co.*, 63 N. W. Rep. 1078.

The court properly overruled the motion of plaintiff in error to dismiss the garnishment proceedings. *Selman v. Orr*, 12 S. W. Rep. 697.

MILLS, C. J.—The writ of error on which this case is brought before us, was sued out by the Alliance Assurance Company, which had been garnished in a suit brought by the firm of Bartlett & Tyler, against Nellie Holmes, and James H. Holmes, her husband. In the suit judgment was recovered for the sum of \$1,100, against the defendant Nellie Holmes. The suit was dismissed as to James H. Holmes. A part of this case has previously been before this court and is reported as *Holmes v. Tyler*, 8 N. M. 613, and the judgment below was reversed and a new trial granted and on such new trial, on October 7, 1897, judgment was entered against Nellie Holmes in the sum of \$1,036.22. From this judgment no appeal was taken and the same became final.

Judgment below was also entered against the garnishee, the Alliance Assurance Company, on November 29, 1897, on the answer filed by it, to the interrogatories propounded by Bartlett & Tyler, in the sum of \$457.60, that being the amount of liability of the said Alliance Assurance Company, if any, under and by virtue of said policy and loss as shown by its answer.

The grounds of error relied on are that the court erred in overruling the motion to dismiss the garnishment proceedings, and that it also committed error in rendering judgment against the plaintiff in error. These assignments may be considered together, for if the garnishment proceedings should have been dismissed it necessarily follows that no judgment should have been entered against that garnishee.

The law of this territory provides that any foreign corporation doing business in this territory shall appoint an agent

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GARNISHMENT:
foreign corpora-
tion: appearance
by agent: pro-
cess: service.

upon whom process may be served (sec. 445, Compiled Laws of 1897). The record shows that one W. E. Leonard was appointed such agent and that on the twenty-second day of November, 1893, he entered his appearance in the district court for the Alliance Assurance Company, of London, England, and for himself, as garnishees, and that on December 4, 1893, interrogatories to the garnishees were filed. On June 1, 1894, an ancillary writ of attachment and garnishee process directed to the Alliance Assurance Company of London, England and the Traders Insurance Company, were also sued out. On July 15, 1897, the plaintiff in error filed a motion withdrawing its appearance as garnishee and moved to dismiss the garnishment proceedings, for the alleged reason that the records of the court do not show that any writ of garnishment was ever served on the moveants.

The court we think very properly overruled this motion, for the appearance of their agent, Leonard, without any objection, bound them. There are also in the record an affidavit of the sheriff that he served the garnishment, and also an affidavit of Leonard that he was served with the writ on July 15, 1893. To Leonard's affidavit is attached a copy of the writ of garnishment served upon him, which proves conclusively that the same was served, nor was the plaintiff in error injured by Leonard having appeared for it, for if the appearance had not been entered judgment could have been taken by default. Besides this between the date of the appearance of Leonard, November 22, 1893, and the date of the filing of the motion to dismiss on July 15, 1897, over three and one-half years had elapsed, during which time attorneys for the plaintiff in error had appeared and had taken part in some of the proceedings in the case. They were estopped at that late date, July 15th, 1897, from setting up that Leonard had no right to appear, unless indeed they could show that they had no knowledge of such appearance, which they do not attempt to prove. Their laches are too great. We can find no good reason for sustaining the contention of the plaintiff in error

that the garnishment proceedings should have been dismissed.

We think that the answer of the garnishee justified the court below in rendering the judgment complained of. The answer admits that the amount of loss and damage to the property of Mrs. Holmes, which was in part destroyed by fire and

upon which property she carried insurance in the plaintiff in error's company, was determined and agreed between it and Mrs. Holmes and was \$1,144 and that the liability of the plaintiff in error's company was the sum of \$457.60. Plaintiff in error further says, in answer to the interrogatories:

"Due proofs of the loss referred were made and said garnishee paid the said amount of \$457.60 into the registry of this court in pursuance of a judgment which was rendered against the said garnishee in favor of the plaintiff for said amount. Defendant afterwards withdrew said money by order of the court on account of the reversal of the judgment. The sum stated has not been since paid. That this garnishee has since offered to pay the sum of \$457.60 into the registry of the court provided said garnishee should be released from all liability to the parties plaintiff and defendant in the above entitled cause. But the conditions of said offer have not been complied with."

It therefore, seems to be clear that the garnishee did have certain moneys in its hands belonging to Mrs. Holmes.

In the hearing before us, counsel for the plaintiff in error did not seriously contend that his client was not liable on the garnishee process for the amount which its answer showed was in its hands, to wit, the sum of \$457.60, but claimed that it was only liable for such sum, without any damages being awarded against it in addition, on account of the delay caused by this appeal.

The plaintiff in error might have saved itself from all risk and liability by making a proper showing and by paying the amount it admits it held as garnishee into court to await the order of the court concerning its disposition.

INSURANCE COM-
pany: answer to
interrogatories.

JUDGMENT: ap-
peal: affirmative:
damages.

Section 3142 of the Compiled Laws, Revision of 1897, says, "And upon the affirmation of any judgment or decision, the supreme court may award to the appellee or defendant in error such damages, not exceeding ten per cent, on the amount of the judgment complained of, as may be just." This seems to us to be a proper case in which to award damages, and we therefore affirm the judgment complained of and order that the plaintiff in error pay to the defendant in error the sum of \$457.60 with interest at the rate of six per cent per annum from the twenty-ninth day of November, 1897, and ten per cent on the amount of such judgment as damages, together with costs.

McFie, Parker, Crumpacker and Leland, JJ., concur.

[No. 762. August 28, 1899.]

THE TRADERS INSURANCE COMPANY, Plaintiff in
Error, v. BARTLETT & TYLER, Defendants in Error.

The facts of this case are substantially the same as those in *Alliance Assurance Co. v. Bartlett & Tyler*, decided at this term, p. 554 ante, except as to amount of garnishee's liability, and the cause is affirmed for the reasons there stated.

Error, from a judgment for plaintiffs, to the Second Judicial District Court, Valencia County. Affirmed, with award for damages.

SYLVESTER G. WILLIAMS and R. W. D. BRYAN for plaintiff in error.

CHILDERS & DOBSON for defendants in error.

PER CURIAM:—The facts in this case are practically identical with those in the case of *The Alliance Assurance*

Company v. Bartlett & Tyler, just decided, except that the answer of the garnishee discloses that its liability for loss on the policy of insurance which it had issued to Mrs. Holmes was the sum of \$623.40.

We therefore affirm the judgment of the court below, and order that the plaintiff in error pay to the defendant in error the sum of \$623.40, with interest at the rate of six per cent per annum from the twenty-ninth day of November, 1897, and ten per cent on the amount of such judgment as damages, together with costs.

McFie, Parker, Crumpacker and Leland, JJ., concur.

[No. 782. August 28, 1899.]

TERRITORY OF NEW MEXICO ex rel. JOHN A. LEE, Executor of Last Will and Testament of WILLIAM E. TALBOTT, Deceased, Appellee, v. FRANK A. HUBBELL, Judge of the Probate Court, Bernalillo County, Appellant.

SYLLABUS BY THE COURT.

PROBATE COURT—JUDGMENT, INTERLOCUTORY—APPEAL TO DISTRICT COURT, MANDAMUS TO COMPEL.—1. Mandamus will not lie to compel an appeal to the district court from a merely interlocutory order of the probate court.

Appeal, from an order of the Second Judicial District Court, Bernalillo County, commanding the probate judge of Bernalillo county to grant an appeal to that court from an interlocutory order of the probate court. Reversed, and remanded, with directions.

The facts are stated in the opinion of the court.

A. B. McMILLEN for appellant.

Unless otherwise provided by statute, questions arising in legal proceedings can not be reviewed in an appellate court,

either upon appeal or exception, until a final judgment has been rendered in the court below. 2 Ency. Pl. and Pr., 52, and citations; also *Huntington v. Moore*, 1 N. M. 471; *Branford v. Erant*, Id. 579; *Comp. Laws 1884*, sec. 2193; *Laws 1891*, chap. 66, p. 123; sec. 3136, *Comp. Laws 1897*; *Territory v. Las Vegas Grant*, 27 Pac. Rep. (N. M.) 414.

A final judgment is one that leaves nothing to be judicially determined between the parties in the trial court. 2 Ency. Pl. and Pr., 53, 54; *Bostwick v. Brinkerhoff*, 107 U. S. 3; *Benjamin v. Dubois*, 118 Id. 48.

There is no appeal from an interlocutory judgment of a probate court without express statutory authority. *Cauthorne v. Weisinger*, 6 Ala. 714; *McAllister v. Thompson*, 32 Id. 497; *Jones v. Jones*, 42 Id. 218; *Waters v. Coke*, 39 Id. 730; *Brown v. Anderson*, 13 Ga. 171; *Eager v. Eager*, 8 Ill. App. 188; *Appeal of Biggs*, 52 Kan. 184; *Showers v. Morrill*, 41 Mich. 700; *Wiggle v. Owen*, 43 Miss. 158; *Troup v. Rice*, 49 Id. 248; *Dyer v. Carr*, 18 Mo. 246; *In re Walker*, 3 Rawle (Pa.) 243; *Appeal of Mitchell*, 60 Pa. St. 502; *Williams v. Saunders*, 45 Tenn. 60; *Adams v. Adams*, 21 Vt. 162; *In re Paten*, 72 Cal. 576; *Horseley v. Hopkins*, 25 Ky. 53; *Gray v. Grundy*, Id. 133; *Watts v. Jones*, 5 Ky. 688; *Chom v. Chom*, 98 Ky.; *Rieffel v. Boissiere*, 4 Mart. (La.) 366; *Succession of Labaure*, 38 La. Ann. 235; *Elliott v. Elliott*, 133 Mass. 555; *Appeal of Calterson*, 100 Pa. St. 9; *Kimball v. Kimball*, 19 Vt. 579; *Leach v. Leach*, 50 Vt. 618; *Elliott on App. Proc.*, sec. 84.

NEILL B. FIELD for appellee.

The district court possesses superintending control over probate courts of this territory. *Comp. Laws 1897*, sec. 900; *Leitensdorfer v. Webb*, 1 N. M. 47; *Territory v. Valdez*, 1 Id. 540; *In re Henriques*, 5 Id. 178; *Perea v. Harrison*, 7 Id. 673.

The statutes of New York and Iowa give to superior tribunals superintending control over inferior courts. In each of

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these jurisdictions the right of appeal such as appellee contends for, within the general limits indicated, is recognized. *Beach v. Fulton Bank*, 2 Wend. 225; *Rowley v. Van Benthuyson*, 16 Wend. 377; *Taylor v. Delancy*, 2 Cain Cas. 143; *Richards v. Burden*, 31 Ia. 305; *June Pierson's Exors.*, 13 Id. 449.

PARKER, J.—It appears from the record that the appellee qualified in the probate court of Bernalillo county, as executor of the last will and testament of William A. Talbott, deceased, in 1888, and that thereafter the said probate court allowed the claims of certain creditors against said estate. It further appears that no further proceedings were taken in the probate court until more than seven years thereafter, when, upon motion of some of said creditors, said probate court ordered appellee to file a report of his doings, and an account of the funds in his hands as such executor. Appellee filed his report in compliance with said order and some of said creditors thereupon filed exceptions to the same. Appellee then filed his motion to strike said exceptions from the files, which motion was denied. Appellee then prayed an appeal from said order denying said motion to the district court of Bernalillo county, which appeal was denied by appellant. Thereupon appellee sued out a writ of mandamus in said district court directed to appellant, which writ was upon hearing made peremptory and commanded the appellant to grant said appeal and to transmit the record below to the district court. Appellant thereupon appealed to this court.

It is assumed by the parties that in the absence of a statute establishing a different rule, appeal lies from final judgments only. It is further claimed by appellant and admitted

PROBATE court:
judgment, interlocutory: appeal
to district court,
mandamus to
compel.

by appellee that the judgment of the probate court in this case is not a final judgment in the sense that it may be reviewed by appeal unless the ordinary rule on the subject is modified by our statute. But appellee contends that the provisions of our statute and the construction heretofore put

upon the same by this court establish a different rule. Section 900 of the Compiled Laws of 1897, is as follows:

"The district courts in the several counties in which they may be held shall have power and jurisdiction as follows: Third.—Appellate jurisdiction from judgments and orders of the probate judges and justices of the peace in all cases not prohibited by law, and shall possess a superintending control over them."

Counsel for appellee contends that the construction put upon this section of the statute by this court supports his contention that this order is appealable and cites *Territory v. Valdez*, 1 N. M. 533; *In re Henriquez*, 5 N. M. 169, and *Perea v. Harrison*, 7 N. M. 666. But we do not so understand these cases. In *Territory v. Valdez*, a probate judge without notice removed an administratrix and appointed a debtor of the estate as her successor. The district court issued a writ of certiorari to the probate court and set aside such judgment and enjoined any repetition of such illegal conduct. The court in that case construed the superintending control clause of section 900 to refer to the power to use such remedies as certiorari and injunction and to be a legislative declaration of a power in the district courts of control over inferior courts which they already possessed by virtue of their general common law and chancery jurisdiction. The courts did not discuss what were and what were not appealable judgments, nor was the same necessary in that case. The judgment in that case was rendered by the probate court without jurisdiction and the district court properly exercised its superintending control by certiorari; and had the judgment been rendered with jurisdiction it was of such a character as to be reviewable by appeal, it being a final judgment. In the case *In re Henriquez*, an administrator was removed and he sued out a writ of certiorari because the court required a bond to stay the proceedings pending appeal. The court denied the writ for the reason that, while he was entitled to appeal, he was required to give bond in order to supersede the judgment, and this he had failed to do. The court in that case again recog-

nized the provision concerning superintending control by the district court to refer to the power to employ such remedies as certiorari. In *Perea v. Harrison*, 7 N. M. 666, exceptions to a guardian's report were sustained and the guardian appealed to the district court, but it does not appear that the question of appealability of this judgment was ever drawn in question or what was the result of the appeal. It is fair to presume, however, that if exceptions to the report were sustained a judgment was entered by the probate court charging the guardian with a sum in excess of that reported and ordering her to pay over the same. This would be a final judgment.

It seems that the provisions of section 900 refer only to the power of the district court to employ the remedies, such as certiorari, mandamus, or injunction, in exercising its superintending control over inferior courts, and in no way enlarges the scope of the uses of such remedies.

The judgment of the probate court in this case, not being a final judgment, it was error to compel by mandamus the granting of an appeal to the district court. It follows that the judgment of the district court must be reversed and the cause remanded with instructions to dismiss the writ of mandamus and remand the cause to the probate court; and it is so ordered.

Mills, C. J., and McFie, J., concur.

[No. 773. August 28, 1899.]

JOHN E. CODLIN, CHAIRMAN, AND MANUEL M. SALAZAR, Clerk of Board of County Commissioners of Colfax County, Plaintiffs in Error, v. CHARLES B. KOHLHOUSEN, CHRISTOPHER M. BLACKWELL, ALFRED C. PRICE, TIMOTHY F. McAULIFFE, Defendants in Error.

SYLLABUS BY THE COURT.

STATUTORY CONSTRUCTION—SPECIAL LEGISLATION—CHAPS. 6, 33, SESSION LAWS 1897—VALIDITY—MANDAMUS.—1. Whenever an act of the legislature can be so construed and applied as to avoid a conflict with the laws of congress and give it the force of law, such construction should be adopted by the court.

2. It is not necessary that the law should operate upon all counties and cities of the territory to be constitutional. If the law is general and uniform throughout the territory, operating upon all of a certain necessary or reasonable class, or upon all who are brought within the relations and circumstances provided in the act and such law has provision for future as well as present operation, it is not obnoxious to the limitations against special and local legislation of the act of congress, known as the Springer Act.

3. Chapters 6 and 33, Session Laws of 1897, are not local or special legislation within the meaning of the act of congress approved July 30, 1886, chapter 818, 24 statute 170, and mandamus lies to compel a board of county commissioners to perform a duty required by chapters 6 and 33.

Error, from a peremptory writ of mandamus issued and obeyed by plaintiffs in error, to the Fourth Judicial District Court, Colfax county. Affirmed.

The facts are stated in the opinion of the court.

R. E. TWITCHELL and W. C. REID for plaintiffs in error.

Chapters 6, 33, of the Laws of 1897, under which the county seat of Colfax county was removed from the town of Springer to the town of Raton, and bonds issued for the erec-

tion of a courthouse and jail, are local and special laws, and therefore in conflict with the act of congress of July 30, 1886, and void. *State ex rel. Columbus v. Mitchell*, 31 Ohio St. 592; *State v. Herman*, 75 Mo. 340; *Devine v. County Comm'rs*, 84 Ill. 591; *State v. Hammer*, 42 N. J. Law 435; *Anderson v. City of Thornton*, Id. 487; *Wheeler v. Philadelphia*, 27 Pa. St. 338; *Commonwealth v. Patton*, 88 Id. 258; *Morrison v. Bachert*, 112 Id. 322; *Topeka v. Gillette*, 5 Am. and Eng. Corp. Cas. 290; *Mode v. Beasley*, 42 N. E. Rep. 728; *Earle v. Board of Education*, 55 Cal. 489.

A. A. JONES for defendants in error.

The law is not local or special because it does not apply to the removal of all county seats. *Edmunds v. Herbrandson*, 50 N. W. Rep. 973; *Fellows v. Walker*, 39 Fed. Rep. 651; *State v. City of Kansas City*, 31 Pac. Rep. 1102. See, also, as to basis of classification, *Harwood v. Wentworth*, 162 U. S. 547; *Commissioners v. McMullin*, 25 N. E. Rep. 677; *State v. Spaulde*, 34 N. W. Rep. 165.

The legislature is the sole judge of what reasonable and natural conditions and circumstances shall form the basis of classification. *State v. Donovan*, 15 Pac. Rep. (Nev.) 785; *Cummings v. City of Chicago*, 33 N. E. Rep. 855; *State v. City of Kansas City*, *supra*, 1102; *Lloyd v. Smith*, 35 Atl. Rep. (Pa.) 200.

McFIE, J.—After hearing upon an order to show cause, a peremptory writ of mandamus was issued and obeyed by the plaintiff in error, and the cause is in this court upon a writ of error.

The plaintiffs in error rely for reversal upon the sole ground that both chapters six and thirty-three, of the Laws of 1897, under and by virtue of which the county seat of Colfax

county was removed from the town of Springer to the town of Raton, and bonds were issued for the erection of a courthouse and jail, are invalid and void in that they are local and

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special laws and therefore in conflict with the act of congress of July 30, 1886, chapter 818, 24 statutes 170, which is so far as applicable to this case, as follows:

"Be it enacted, etc., that the legislatures of the territories of the United States, now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases, that is to say: Locating or changing county seats; regulating county and township affairs.

"In all other cases where a general law can be made applicable no special law shall be enacted in any of the territories of the United States by the territorial legislatures thereof."

There is no question of pleading or practice involved in the case as presented by counsel in their briefs, and this court decides the case upon the one question argued in the briefs, that chapters 6 and 33, Laws of 1897, are local and special laws and void because in conflict with the act of congress above set forth and referred to.

The legislative assembly of New Mexico has power to enact laws upon all rightful subjects of legislation, provided such laws are not in conflict with the constitution or laws of the United States. Congress has the power to modify or nullify laws enacted by the legislative assembly of a territory, but if congress fails or refuses to act, such laws remain in force so far as congressional action is concerned. There was no action by congress as to these laws.

The location or removal of county seats; the regulation of county affairs, and the classification of counties are undoubtedly rightful subjects of legislation, and territorial legislatures have power to enact laws upon such subjects. There is, indeed, a presumption in favor of legislative action which is fully pointed out by the supreme court of Pennsylvania in the case of *Lloyd v. Smith*, 35 Atl. Rep. 200.

"The presumption is always in favor of the legislative command and it must prevail unless clearly transgressing the constitutional prohibition."

The laws which the plaintiffs in error seek to have this court declare void are entitled to this favorable presumption and should stand unless it is overcome.

An examination of the laws in question also shows that upon their face they are general laws. Section 1, chapter 6, begins as follows: "Whenever the citizens of any county in this territory shall present a petition to the board of county commissioners, etc.," and section 1, chapter 33, begins as follows: "Hereafter, when the county seat of any county in this territory shall be established at any incorporated city, etc."

So that these laws do not appear to be subject to the attack made upon them either in their titles or in the body of the acts; but counsel for plaintiffs in error, in his brief, says:

"It is true that the statute in question does not specifically name the county of Colfax, but the conditions and provisions in section 1 thereof are of that peculiar kind that they exclude every other county in the territory from taking advantage of the provisions of the statute otherwise, and as a matter of fact, prevent the removal of any county seat in the entire territory, except that of the county of Colfax. * * * * * It applies, and can only be made to apply to the county of Colfax."

It is clear that section 1 of chapter 6, and the first proviso thereto, is not subject to the above criticism, but the oral argument developed the fact that the conditions which counsel complained of were contained in the last proviso to section 1, as follows:

"That the city, town or village named in the petition shall be at least twenty miles distant from, and of a population larger than the then county seat of said county; and that no proposition to remove a county seat from a city, town or village situated on a railroad to one not so situated shall be entertained or voted upon."

Before considering the terms of this proviso, it is well to observe that section 1, together with its provisos, and in fact the entire chapter 6 is free from the vice which has caused the

courts of the United States, and many of the states and territories, to overthrow legislation as local and special.

Counsel for plaintiffs in error has cited many of the cases wherein legislative enactments have been declared unconstitutional and void because they were held to be special or local laws, but an examination of those cases will disclose a marked distinction between the laws thus involved and held to be special, and those involved in this case.

In *State ex rel. Columbus v. Mitchell*, 31 Ohio St. 592, the statute held to be unconstitutional provided that it should be applicable to "cities of the second class, having a population of over thirty-one thousand at the last federal census." The court in declaring that statute special legislation, says:

"Columbus is the only city in the state having the population named, at the last federal census, and the act therefore applies alone to that city, and never can apply to any other."

This act, as will be seen, related only to the conditions existing at the last federal census and had no future operation, and it is clear from the language of the court that the fact that the law had no future operation was the reason for its overthrow. The intent to legislate for the single city of Columbus was established beyond question, in the failure of the law to provide for its future operation upon cities which might thereafter have a population of thirty-one thousand.

That the court did not declare the law unconstitutional on the ground that it operated upon but one city, but because the law had not provisions for future application to cities similarly situated, is made clear by the case of *Fellows v. Walker*, 39 Fed. Rep. 651.

The circuit court for the Northern District of Ohio says: "The constitutionality of the act is denied because it is said to be a special act conferring corporate powers, that it is special because the city of Toledo is the only city of the third grade of the first-class in the state of Ohio, and the only city to which this act is or can be applicable. But this objection can not be sustained. It is well settled by authority in Ohio that the classification of municipal corporations is valid and that legisla-

tion which is applicable to a class is general, although there may be at that time but one city in that class."

In *State v. Herman*, 75 Mo. 340, the act under consideration applied only to cities "having a population of one hundred thousand or more." The court expressly referred to the fact that the act was limited to then existing conditions and held the act to be special legislation because it did not permit other cities which might thereafter have a population of one hundred thousand to have the benefit of its provisions.

The statute of Illinois declared special legislation, by the supreme court of Illinois, in the case of *Devine v. Board of County Commissioners of Cook County*, 84 Ill. 591, was limited to cities of more than one hundred thousand population, being applicable only to the city of Chicago; it was also limited in duration to six years; it provided for issuing bonds for the erecting of a courthouse on the site heretofore used, and one of the conditions for taking advantage of the act was "recent destruction by fire of public buildings." The court in that case found that the legislation was limited in several ways to the single city of Chicago and county of Cook. No other city or county in the state had the requisite population, and the six year limit fixed made it unreasonable to believe that any other city would obtain the necessary population within the six years so as to secure the benefits of the act; and when the act further required the courthouse to be erected on the site heretofore used for the reason that the building had recently been destroyed by fire—necessarily meaning the great Chicago fire—the court properly said that the act by its very terms precludes it from having any application to any county except the county of Cook. The intent of this law, following as it did, the great Chicago fire, was too plain for discussion and the court was compelled to hold the law to be local and special legislation.

In *State v. Hammer*, 42 N. J. Law 435, the law under consideration was limited as follows: "That in any city of this state where a board of assessment and revision of taxes now exists."

The court found that such boards existed, at the time the act was passed, in but two cities of the state, Newark and Elizabeth, and the law was held to be local or special legislation because by its terms the law "can and must ever apply to Elizabeth and Newark and no other cities." The court, however, distinctly say in that case, that to be a general law it is not necessary that it shall apply to all cities and towns.

So in *Anderson v. The City of Thornton*, 42 N. J. Law 487, the law applied to cities "Having a population of not less than 25,000 inhabitants." Thus it was limited in its operation to present conditions and had no provisions for future application.

The supreme court of Pennsylvania sustained the act of 1874, as its operation was made applicable in the future as well as the present. *Wheeler v. Philadelphia*, 27 Pa. St. 338. But the same court held the act of 1878 to be special as it made no provision for future application. *Commonwealth v. Patton*, 88 Pa. St. 258.

In *Morrison v. Bachert*, 112 Pa. St. 322, the court says: "An act excluding perpetually from its operation counties containing more than one hundred and fifty thousand or less than ten thousand is a local law."

In *City of Topeka v. Gillette*, 5 Am. & Eng. Corp. Cases 290, the vice of the law was, that it fixed the unreasonably short limitation of fifty-eight days, and arbitrarily excluded from its operation "all cities not obtaining the benefit of the act within fifty-eight days after its passage." But in *State v. The City of Kansas City*, 31 Pac. Rep. 1102 the supreme court said:

"It is not necessary that the law should operate upon all cities of the state to be constitutional. If it is general and uniform throughout the state, operating upon all of a certain class, or upon all who are brought within the relations and circumstances provided in the act it is not obnoxious to the limitations against special legislation."

In *State v. Spaulde*, 34 N. W. Rep. 165, the supreme court

of Minnesota upheld a statute against alleged special legislation, and in so doing said:

“A law, to be general, need not operate alike upon all the inhabitants of the states, or all the cities, or all the villages, in the state. To require that would be utterly impracticable. A law is general which operates alike upon all the inhabitants of all the cities, or all the villages, or other subjects of a class of such subjects of legislation. That for the purpose of legislation it may be necessary to make, and that the legislature may make, such classification, is undoubted the only practical limitation to this power is that the classification shall be based upon some natural reason; some reason suggested by necessity; by some difference in the situation and circumstances of the subjects classified suggesting the necessity of different legislation with respect to them—and shall not be merely arbitrary, with no apparent reason except a desire to evade, under the forms of a general law, the constitutional inhibition of special legislation.”

From these decisions it is evident that the grounds upon which the laws under consideration were declared to be special or local was, that there was no provisions for their future operation, or if there was, it was of an unreasonably short duration, as in the case from Kansas it was fifty-eight days, and in the case from Illinois it was six years.

A law may be made to apply to conditions existing at the time the law is enacted, but it must also apply to similar conditions in the future. Laws usually take effect from and after their passage, and, therefore, their future operation is a very essential characteristic.

The limitations in the laws declared to be void by the courts, in the cases above cited, were purely arbitrary and without any reasonable foundation. In each case they served to prevent the future general operation of the laws and thus made those laws special, whether they were general in form or not.

From the cases of *State v. Kansas City* and *State v. Spaulde*, above referred to, it is clear that to be a general law it

is not necessary that it shall operate upon all of the counties of cities and towns of the state or territory. Almost every state and territory has classified its counties and cities, by population, wealth or otherwise, and the courts have sustained these classifications wherever they are not purely arbitrary and without reason for such discrimination. Such classification may be made by direct enactment or may be based upon circumstances and conditions which are natural, reasonable and germane to the subject-matter of the legislative act.

The counties, cities and towns of this territory have been classified by law for different purposes, and these laws are valid and are not special legislation although under them the same officer draws a larger salary, for similar services, in one county, than in another. There is a reason for this difference in the salaries, and this reason justifies the law.

A case involving such a classification and difference in salaries was taken to the supreme court of the United States from the territory of Arizona, and in deciding the case the court said:

"We are of the opinion that the territorial act is not a local or special law, within the meaning of the act of congress. It is true that the practical effect of the former is to establish higher salaries for the particular officers named in some counties than for the same class of officers in other counties, but that does not make it a local or special law." *Harwood v. Wentworth*, 162 U. S. 547.

In *Commissioners v. McMullin*, 25 N. E. Rep. 677, which was a case which applied to but one city in the state, at the time of the passage of the act, but there was provision for future operation, the court said:

"If it be true, as suggested, that the act is applicable to the conditions existing in a single city in the state, that fact does not necessarily render it local or special legislation. It is general in its terms, and applies to all cities of the state which at the time of its passage has parks under the control of park commissioners, or that might at any time thereafter so have parks. If, because only a single city has such parks, an act

general in its application to all cities, would be local or special legislation no valid act could be passed affecting such existing parks."

On the other hand, classifications and discriminations are uniformly overthrown by the courts where they are purely arbitrary and without substantial reason. As an illustration of such arbitrary classification, take the case of *Davis v. Clark*, 106 Pa. St. 377, wherein the statute under consideration excluded all counties having a population of two hundred thousand from the operation of the mechanics' lien law. It is apparent that there is no valid reason why the mechanics' lien law should not be in force throughout the state.

And in *Scranton v. Silkman*, the act allowed the appeal from assessment of taxes in counties of less than five hundred thousand population. The terms of this act made it purely arbitrary, as such a law should be available to every citizen of the state.

It will be seen, therefore, that while the courts will not uphold laws which by unreasonable and arbitrary limitations disclose an intent on the part of the legislature to prevent the general operation of the law; they will uphold as general laws classifications and discriminations based on various circumstances and conditions which are just, reasonable and germane to the subject-matter of the legislative act.

The supreme court of Pennsylvania, in the case of *Lloyd v. Smith*, 35 Atl. Rep. 200, says:

"Classification of counties is therefore as permissible as classification of cities, and the legislature may determine what differences in situation, circumstances and needs call for a difference of class, subject to the supervision of the courts as the final interpreters of the constitution, to see that it is actually classification, and not special legislation under that guise. The presumption is always in favor of the legislative command, and it must prevail, unless clearly transgressing the constitutional prohibition."

In *State v. Kansas City*, 31 Pac. Rep. 1102, the court says: "It belongs to the legislature to make the classifica-

tion, and, while it can not so classify them as to make the law special in its application and results, yet many classes may properly be made. It need not be restricted to the population of municipalities, but it would seem that it might be based on the conduct or condition of the people resident therein."

In the light of these decisions we will not examine the acts involved in this case. We have already observed that the acts purport to be of general application and therefore not in conflict with the act of congress unless conditions imposed show that the legislative intent was to limit the operation of the acts to the county of Colfax alone, and that by the terms of the acts they could have no application to any other counties of the territory similarly situated.

The conditions in chapter 6, relied upon by plaintiff in error, are the following:

"Provided further, that the city, town or village named in the petition shall be at least twenty miles distant and of a larger population than the then county seat of said county; and that no proposition to remove a county seat from a city, town or village, situated on a railroad to one not so situated, shall be entertained or voted upon."

On page 10 of the brief of counsel for plaintiff in error, he says: "No express words that could have been used by the legislature could limit the operation of this statute to the county of Colfax more absolutely and definitely than those employed."

And on page 13 counsel says: "It selects the city of Raton, in the county of Colfax, as the only place in New Mexico to which a county seat may be removed."

We are unable to agree with the conclusion of the counsel. This court takes judicial notice of the cities and towns of the territory, together with their location and population. The court knows, therefore, that at the time chapter 6, which provides for the removal of county seats, was enacted there were at least three counties which were subject to its operation, namely, Colfax, Lincoln, Guadalupe. Raton was a larger town than Springer in Colfax, and more than twenty miles

distant. White Oaks was a larger town than Lincoln, in Lincoln, and more than twenty miles distant, and Anton Chico was a larger town than Puerto de Luna, in Guadalupe, and more than twenty miles distant, so that counsel's contention that the act could not apply to any other than the city of Raton, and the county of Colfax, can not be sustained.

It does not appear, therefore, that the legislature intended to limit the operation of the act to Colfax county, not that such is the effect; on the contrary, the act at the time of its passage applied to several counties, and had unlimited future application to all counties similarly situated.

It is not to be supposed that the act of congress of July 30, 1886, was intended to prohibit the passage of all territorial laws on the subject of the removal of the county seats which were not so framed that every county seat in every county could be removed under its provisions as soon as the law was passed, for if such was the intention of congress or effect of the act, it would be tantamount to prohibition of all future legislation on the subject.

Laws for the removal of county seats are almost necessarily conditional and made applicable to all counties similarly situated. It is a matter of common knowledge that in many of the states laws have been enacted prohibiting a vote for the removal of county seats oftener than once in ten years, and such laws are sustained by the courts, although there is a constitutional provision prohibiting special or local legislation. There is a valid reason for such a provision. It is common knowledge that the removal of county seats is a fruitful source of trouble and even bloodshed in the cities and towns involved in such contests, and for that reason ease and frequency of such removals are and should be discouraged by conditional legislation; and, where such laws provide for the removal of county seats upon conditions reasonable and for the best interests of the people, if they provide for the future operation of the law upon all counties similarly situated, they are not in conflict with the above act of congress, though but few

counties may have been required conditions at the time the act is passed.

The conditions upon which county seats may be removed, under chapter 6, are:

"That the city, town or village named in the petition shall be at least twenty miles distant and of a larger population than the then county seat of said county."

These conditions are entirely just and reasonable in the light of what has been said, but, further, the legislature is presumed to have knowledge of the conditions existing in the territory; also of its counties, cities, towns and villages, and of their location and population. It must be presumed to have known that most of the cities and towns of the territory are comparatively small, and in some instances unsuitable for the accommodation of the court; that in many instances, especially along the railroads, new cities and towns have been established within one or two miles of each other. Knowing these facts and conditions to exist, it is reasonable to believe that the legislature in these enactments intended that county seats should be established in the larger cities where the courts and the people attending them could have suitable accommodations and that hereafter county seats shall not be located in smaller cities and towns than those in which they now are. It is also reasonable to believe that the legislature intended, in fixing the twenty mile limit, to prevent cities and towns situated within a few miles of each other from engaging in those injurious contests for the supremacy for the location of the county seat, based upon the population only. The wisdom of these conditions is apparent, and it is within the power of the legislature to make them.

In *State v. Kansas City*, 31 Pac. Rep. 1101, an act of the legislature providing for the consolidation of cities of a certain class and fixing three-fourths of a mile apart, and not less than fifteen thousand inhabitants, as conditions to consolidation, was sustained by the court against alleged special legislation.

Another condition is as follows: "That no proposition

to remove a county seat from a city, town or village situated on a railroad, to one not so situated, etc.”

In inserting this condition the legislature intended to prevent all counties, after the passage of the act, from removing their county seats from towns situated on a railroad to those not upon a railroad. Accessibility should always be considered in locating county seats, as business can be transacted at county seats situated upon a railroad more expeditiously and economically. This condition is both germane and reasonable, and a similar provision has been considered with approval in the case of *Edmunds v. Herbrandson*, 50 N. W. 973.

The last provision for our consideration is that which provides the county seats shall not be removed, unless the parties seeking the removal to some other city or town shall provide, free of cost to the county, a suitable site for the courthouse and jail, and also contribute at least \$8,000 towards the expense of erecting a courthouse and jail. It is a matter of common knowledge that the removal of a county seat is a matter of larger expense to the county, mainly caused by the erection of a new courthouse and jail, and we see nothing unreasonable or improper in a legislative provision enabling counties to secure aid in the erection of new buildings from the city, town or persons benefited by the removal of the county seat. It is a matter of common notoriety that the location of public enterprises of corporations and individuals are secured in this way by the different cities and towns throughout the county, and we see no valid reason for denying this privilege to counties in case of removal of county seats, especially when it is remembered that such removals should not be facilitated.

All of these provisions apply to all future removals of county seats, and we are unable to see how any of them confine the operation of the law to Colfax county or make this law obnoxious to the act of congress. These provisos are simply conditions precedent to all future removals, and are clearly within the power of the legislature to enact.

In *Cummings v. City of Chicago*, 33 N. E. 855, the court says:

"The legislature, for reasons appearing satisfactory to it, saw fit not to apply to the smaller assessments in the larger cities of the state the somewhat cumbersome mode of collecting the same provided for in the act under consideration. Whether this was wise or unwise is a question for legislative consideration. Reasons, for the distinction, existing in the legislative contemplation, it was lawful for the legislature to thus discriminate, if enacted into a general law, uniform in its application to all cities of the state similarly situated."

Passing now to the consideration of chapter 33, we find that the portion designated by counsel for plaintiff in error as special legislation, is the following paragraph of section 1:

"Hereafter, when the county seat of any county in this territory shall be established at any incorporated city and the council of such city shall desire to join with said county in the erection of a public building to be used as a courthouse and jail, as well as for city purposes."

It must be borne in mind that this is not an act providing for the removal of county seats, but is an act authorizing incorporated cities, in case they desire to do so, to join with the county and issue bonds to aid the erection and use of the public buildings by both the county and the city in all cases where a county seat shall be removed to such city.

Counsel for plaintiffs in error admit that cities may be classified and that the courts uphold such classification where the terms are not purely arbitrary but are essential to the objects of the law, but insist that the classification made by this law can not be sustained because the law does not apply to all the incorporated cities of the territory.

It is true that the law did not have a uniform application to all of the incorporated cities at the time of its enactment, and it is true that the law was not applicable to Santa Fe, Socorro and Silver City because these cities were incorporated and were county seats of their respective counties when the law was passed, but it does not follow that because the law

is not uniform of operation upon all such cities that it is not a general law.

The doctrine announced by the supreme court of New Jersey, in the case of *State v. Hammer*, seems to have been sustained by the courts generally. In that case the court said:

"But it has further been considered that these classes also may be subdivided by the legislature so that a law will be general which yet touches only a subdivision. * * * Thus, a statute giving to all cities bordering upon tide water the power to construct docks or to establish quarantine regulations, or providing that in all towns having volunteer fire departments the members of the department should choose a commission to govern them, would, I presume, be valid. These groups would, according to the principle laid down, be naturally classified for legislation touching their peculiar qualities, and such legislation, though affecting them alone, would be general. * * * There must be a substantial distinction having reference to the subject-matter of the proposed legislation, between the places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation."

Now, in the act under consideration the "marks of distinction" between the cities included and excluded are patent. No one can doubt the economy and beneficial character of the legislation proposed by the act. Is it therefore reasonable to believe that the act was intended to make it impossible for any other cities or counties to have the benefit of this wise legislation simply because there was one or two more counties to which it was wholly inapplicable and undesirable? We think not. The legislature is charged with a knowledge of the facts that the county seats of the counties of Santa Fe, Socorro and Grant had been for many years established in incorporated cities, and had already erected courthouse and jails, without cooperation as provided in chapter 33; that for this reason the proposed legislation could be of no benefit to such cities or

counties, and on the contrary, its application to them would be without justification. The intent of the legislature undoubtedly was to apply the law to all cities and counties similarly situated, having a present application to all cities within the provisions of the act and a future application to all cities in the territory attaining similar conditions. The necessity for the discrimination made in this act is apparent and fully justifies its enactment as general legislation which it purports to be.

Taking the view that the cities of Santa Fe, Socorro and Silver City, are excluded from the operation of the act, the exclusion arises from circumstances rather than from the terms of the act.

"It is one thing to assert that all except a single object will be forever kept from the class by circumstances, and another and entirely different thing to attempt to exclude all others by the terms of the law." *Edmunds v. Herbrandson*, 50 N. W. Rep. 973.

The word "hereafter" is so used as to make the intent of the legislature in using it somewhat doubtful. It is contended by plaintiff in error that it relates to the establishment of county seats, while the defendant in error insists that the word "hereafter" relates to power to issue bonds and that a proper and reasonable construction of the act would be, that hereafter the city council of any incorporated city may issue bonds when the county seat of any county in this territory shall be established, etc.

Now, when it is considered that the purpose of the act is not the removal of county seats, but is for the purpose of authorizing the issuance of bonds under certain circumstances, and for certain purposes defined in the act, it would seem that the latter view is more in accord with the purpose of the legislature than the view taken by the plaintiffs in error. To determine the intent of the legislature from a strict grammatical construction of the language of the act would be of doubtful propriety in this territory; therefore, such construc-

tion should be adopted as will best carry into effect and sustain the law.

"Whenever an act of the legislature can be so construed and applied as to avoid a conflict with the constitution, and give it the force of law, such construction should be adopted by the court." *Peel Splint Coal Co. v. State*, 15 S. E. Rep. (W. Va.) 1000; *Owen v. Sioux City*, 59 N. W. Rep. 5.

We are of the opinion, that, whether these three cities were, or were not, excluded from the operation of the act is not material; the acts are not special or local legislation, within the meaning of the act of congress of July 30, 1886. It follows from this conclusion that the court below committed no error in awarding the peremptory writ of mandamus upon the hearing, and the command of the writ having been obeyed, and the bonds involved issued, the judgment of the court below should not be disturbed.

CHAPTERS 6, 33.
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The judgment of the court below is affirmed, with costs.

Mills, C. J., Parker and Crumpacker, JJ., concur; Leland, J. not sitting.

[No. 795. August 28, 1899.]

TERRITORY OF NEW MEXICO, Appellee, v. W. R. CHRISTMAN, Appellant.

SYLLABUS BY THE COURT.

- CRIMINAL LAW—APPEAL—UNCERTIFIED TRANSCRIPT—CERTIFICATION BY DEPUTY CLERK—SUFFICIENCY—ERROR—MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS—STATUTORY DESCRIPTION—SUFFICIENCY.—1. In a criminal case, that part of a purported transcript of record not certified in accordance with rule V, section 2, of this court, by the clerk of the district court in which the appeal is allowed, will on motion be stricken from the record.

2. In such a case, the certification of the record in the name of the clerk of the district court, signed in the name of the clerk by the deputy, is a sufficient certification of the record.
3. Alleged errors relating to proceedings during the trial of a criminal case and to the overruling of a motion for a continuance can not be reviewed, unless called to the attention of the trial court by motion, for a new trial, exceptions saved to the overruling of such motion and the motion made matter of record by bill of exceptions.
4. The use of the statutory description "one neat cattle" in an indictment, is a sufficient description as commonly applied in the United States and this Territory to describe a beast of the bovine genus.

Appeal, from a judgment of the Fifth Judicial District Court, Eddy County, convicting defendant of larceny and sentencing him to three years imprisonment in the penitentiary. Affirmed.

The facts are stated in the opinion of the court.

A. A. FREEMAN and J. O. CAMERON for appellant.

The affidavit in support of the motion for a continuance is clearly within the requirements of the law. Comp. Laws 1897, sec. 2986. See, also, *McAdams v. State*, 5 S. W. Rep. 826; *Rider v. State*, Id. 829; *Williams v. State*, 6 Neb. 34; *Hayne v. State*, 14 Id. 303; *Grandy v. State*, 43 N. W. Rep. (Neb.) 747; *Baker v. Comm.*, 10 S. W. Rep. 336; *Maines v. State*, 9 Id. 51; *State v. Adams*, 3 So. Rep. 30; *State v. Boitréaux*, 31 La. Ann. 188; *State v. Anderson*, 9 S. W. Rep. (Mo.) 636; *Curtis v. State*, 40 Id. 266.

"When the evidence adduced on the trial made it apparent that the absent testimony was not only probably true, but very material to the interests of the defendant, it should have availed on the motion for new trial, and the same should have been granted. *Price v. State*, 2 Soth. Rep. 623; *Frazier v. State*, 2 S. W. Rep. 637; *Tucker v. State*, Id. 893.

The description of the property in the indictment must be stated with reasonable certainty. The term "one neat cattle" is too indefinite. 10 Am. and Eng. Ency. of Law, 596; 2 Bish., Crim. Pr. 702; *Keller v. State*, 51 Ind. 111; *McLaughlin v. State*, 45 Id. 338; *State v. Watson*, 13 Ia. 489;

Jane v. Comm., 3 Met. (Ky.) 18; Comm. v. Dean, 109 Mass. 349; State v. Rochtorde, 52 Mo. 99; State v. Garey, 26 N. H. 339; State v. Dougherty, 4 Ore. 200; Galliger v. State, 26 Wis. 423; Rex v. Stevens, 3 East 132.

EDWARD L. BARTLETT, solicitor-general, for the territory.

There is no beginning or heading of what the transcript in this case purports to be, and no certificate, by the clerk of the court, as to its correctness, as required by law and the rules of this court. Comp. Laws 1897, sec. 3140; Sup. Ct. rule 5, sec. 2. This certificate purports to be made by the deputy, and there is no provision of law for any such officer, and is not in compliance with the rule.

After this attempted certificate, appears a paper indorsed "Bill of Exceptions," certified to by one Orrin Rice as being "a true transcript" of his short-hand notes, and after that the judge signs and settles the same as a bill of exceptions. There is no date to this signature, no notice to any one appears anywhere of the time for presenting the bill of exceptions as provided by law. Comp. Laws 1897; Lumber Co. v. Pennington, 2 Dak. 470; Williams v. People, 53 Pac. Rep. 590 3 Ency. Pl. and Pr. 432, and notes; Snead v. Tietgen, 325.

If the court holds that any portion of the record proper is here, it can only consider that portion of the transcript, and not the bill of exceptions, for the reasons stated above. Railroad Co. v. Saxton, 3 N. M. 446; Evans v. Baggs, 4 Id. 69.

Nowhere in the alleged bill of exceptions does there appear the instructions of the court, the motion for a continuance complained of by appellant, nor any motion for a new trial, and there is nothing for this court to pass upon. Chavez v. Territory, 50 Pac. Rep. 324; Padilla v. Territory, 45 Id. 1120; Territory v. Barrett, 42 Id. 66.

This is a statutory offense, and the description in the indictment complies with the statute which is all that is required. Bish., Stat. Crim. 426; State v. Murphy, 39 Tex. 46.

CRUMPACKER, J.—Appellant was on October 15, 1899, the fifth day of the October term of the district court for Eddy county, indicted for the larceny of one neat cattle. Within three days thereafter the defendant moved for a continuance of the cause on the ground of the absence of a material witness, and on October 18, the court overruled the motion. A motion to quash the indictment having also been overruled on the same day, the issue was submitted to a jury, and on the following day, October 19, a verdict of guilty was returned; and no motion for new trial and in arrest of judgment having been interposed and overruled on October 23, defendant was sentenced to three years imprisonment in the penitentiary, from which sentence he prayed and was granted an appeal to this court.

Appellant's briefs present but two questions; first, the insufficiency of the description of the property set out in the indictment; and, second, the action of the trial court in overruling the motion for a continuance.

The territory presents for our consideration, however, the preliminary questions of the sufficiency of the transcript of record to properly bring the cause into this court for review. The paper filed in this court as the "transcript of record," comprises, first, twenty-seven pages of typewritten matter under manuscript cover, indorsed "transcript of record," containing besides the indictment, plea, verdict and judgment or what at ancient common law was the judgment-roll or record proper, various motions for continuance, to quash, for new trial and in arrest of judgment, the instructions given and orders of court, and concluding with a certificate of the clerk that the "foregoing is a full, true, correct and complete transcript of all of the record and files of papers in a cause lately pending, except the subpoenas," signed by a deputy clerk in the name of his principal by himself as deputy; and, second, immediately following the part so indorsed "transcript of record" additional pages from one to one hundred and fifteen, of typewritten matter indorsed "bill of exceptions—Testimony" comprising

CRIMINAL law:
appeal:
uncertified
transcript

the entire proceedings had at the trial of the cause, which latter is certified by the stenographer as a true and correct transcript of his shorthand notes of the testimony and concludes with the following recital, "for as much therefore that the above and foregoing matters are not contained in the record, it is therefore ordered and adjudged that the said matters and each of them be and are hereby signed, sealed and made a part of the record herein, which is accordingly done. H. B. Hamilton, Judge." The solicitor-general insists that the paper marked "Bill of Exceptions—Testimony," not having been certified by the clerk in accordance with the rules of court or at all, may not be considered here as a part of the transcript of record. Rule V, section 2 of this court provides that "the clerk of the court in which an appeal shall be allowed * * * shall make return of the same by transmitting a true copy of the record and of all proceedings in the cause under his hand and the seal of the court." The paper objected to not having been certified in accordance with the rule, it will not be considered as a part of the record and is stricken from the record before us for review. What remains of the purported transcript, being the first twenty-seven pages with contents as hereinbefore set out, is further objected to because it is certified by a deputy clerk. But the certification being made in the name of the clerk and the deputy having signed it in the name of his principal and the

CERTIFICATION by
deputy clerk:
sufficiency.

certificate being in all other particulars as required by law, the writing following the signing in the name of the clerk of "by ——— deputy" will be treated as surplusage. Sections 1011, 1012, 1013 and 1014, Compiled Laws, New Mexico 1897, provide for the appointment of deputy clerks by the clerks of the district court and authorize such deputies to perform the duties of the office in the name of the principal. But even should it be true that these sections are not within the purview of the organic act of the territory (which we need not here decide) still we should hold that under the common law, public officers, such as clerks of the district courts, whose duties are

ministerial, had general legal power to depute their powers. This remaining part of the transcript therefore being duly certified, it is further insisted by the territory that there being no bill of exceptions regularly signed, sealed and settled by the court as such, that the motions, affidavits and instructions set out together with the exceptions entered on the journal of the court, embodied in that part of the transcript of record which is duly certified, may not be considered as properly part of the record. In support of this contention is cited the case of *Chaves y Chaves v. Territory*, 50 Pac. Rep. 324 (decided by this court October 2, 1897), a murder case, in which defendant was under sentence of death, and where this court held that "it can not pass upon these alleged errors as there is no motion for a new trial in the bill of exceptions. It is a fundamental rule that such errors must be brought to the attention of the court below by a motion for a new trial, and exception must be saved to the overruling of that motion and the motion must be made a matter of record by bill of exceptions. These cases are controlling and here followed. The motions for continuance, new trial, affidavits, etc., and the rulings of the court thereon here complained of, not having been called to the attention of the trial court by motion for new trial, duly excepted to and made matters of record by bill of exceptions properly incorporated in the record, may not here be considered.

ERROR: motion
for new trial:
bill of excep-
tions.

The sole question, therefore, raised by the record is upon the objection to the indictment upon the ground of insufficient description of the property alleged to have been stolen. The descriptive term used in the indictment "one neat cattle" is the same as that used in the statute (section 79, C. L. 1897) and is a sufficient term as commonly applied in the United States to describe a beast of the bovine genus. *State v. Crow*, 17 S. W. Rep. 745; *Castello v. State*, 36 Tex. 324; *Habatter v. State*, 32 Tex. 43. The indictment, complying with such

STATUTORY
description:
sufficiency.

statutory description it is sufficient, and the demurrer thereto was properly overruled.

There being no error in the record proper, the judgment below is affirmed.

Mills, C. J., Parker and McFie, JJ., concur; Leland, J., absent.

[No. 794. August 28, 1899.]

THE BOARD OF EDUCATION OF THE TOWN OF
EDDY, TERRITORY OF NEW MEXICO, Appel-
lant, v. SAMUEL T. BITTING, Appellee.

SYLLABUS BY THE COURT.

BOARD OF EDUCATION—ISSUANCE OF WARRANTS—STATUTORY INHIBITION—
POWER TO INCUR INDEBTEDNESS FOR SCHOOL PURPOSES—MUNICIPAL
CORPORATION.—1. Prior to March 12, 1897, there was no statutory
inhibition upon the board of education of a town of New Mexico from
issuing warrants evidencing indebtedness up to the four per centum
federal limitation, although there was not at the time of their issuance
funds in the hands of the treasurer with which to pay the same.

2. Said board of education may independently of any political or other
municipal corporation or other subdivision of the territory, and
regardless of the fact that the corporation known as the town of Eddy
is situate wholly within the same territorial limits, lawfully incur an
indebtedness for school purposes not to exceed four per centum of the
value of the taxable property within its limits, to be ascertained by
the last assessment for territorial and county taxes previous to the
incurring of such indebtedness.

3. The board of education of the town of Eddy is a distinct municipal
corporation, for school purposes, and is one of the corporations enumer-
ated in the act of congress of July 30, 1886, known as the federal
limitation act.

Appeal, from a judgment for plaintiff; from the Fifth
Judicial District Court, Eddy County. Modified and affirmed.

The facts are stated in the opinion of the court.

U S. BATEMAN for appellant.

Even if the warrants within themselves were sufficient
to sustain a cause of action, which appellant disputes and asks

the court to pass on, they were issued in violation of law, for it is admitted by the pleadings that defendant had no money anywhere with which to pay the same, and defendant could not contract such indebtedness. Acts 1889, 196, sec. 4; Acts 1891, 53, sec. 22.

The legislature can not take a part of a county in this territory, and create out of that part numerous corporations, and give to each authority to afterwards respectively become indebted in an amount equal to four per cent of the taxable property within that part of the county. Supp., U. S., Stat. 504, sec. 4; *City of Guthrie v. New Vienna Bank*, 38 Pac. Rep. 4.

A. A. FREEMAN and J. O. CAMERON for appellee.

The warrants are in all essential points as required by the statutes. Comp. Laws, sec. 1571.

The constitution of Illinois prohibits the state from subscribing to railroads; yet it was held that the state might authorize counties to do so. *Pettiman v. Supervisors*, 19 Ill. 411; *Cass v. Dillon*, 2 Ohio St. 607; 1 Dill. on Munic. Corp. 138; *Clark v. Jamesville*, 10 Wis. 134.

Appellant is one of the political subdivisions of the territory to which the act of congress specially delegates the power to create an indebtedness of four per cent of the assessed value of the property situated within its limits. Comp. Laws, N. M., secs. 1564, 1577, 1583.

CRUMPACKER, J.—This is a suit instituted by Samuel T. Bitting in the district court of the Fifth judicial district, within and for the county of Eddy, against the board of education of the town of Eddy, of the territory of New Mexico, based upon two warrants bearing date February 5, 1895, and July 9, 1895, for the amounts of eighty and thirty-seven and fifty-one one-hundredths dollars respectively, drawn by the president and countersigned by the clerk of said board upon the treasurer of the Eddy school board.

The declaration, alleging the issuance of the warrants in payment of an indebtedness of teachers' salaries, their assignment by indorsement to the plaintiff, plaintiff's demand and defendant's refusal to pay and the damage sustained, was denied by defendant in its answer of two paragraphs, as follows:

"First: That at the time each of the two said warrants were issued, there was no money in the treasury or in any other place, with which to pay the said warrants, and therefore defendant had no authority to issue them.

"Second: That at the time each of the said warrants were issued, the board of education of the town of Eddy of the territory of New Mexico, the defendant herein, was indebted as such corporation, and the property of such corporation was burdened in other debts besides those mentioned by the plaintiff, in the sum of between \$18,000 and \$19,000, there being of said amount \$12,500 bonded debts and the rest being such as plaintiff has sued on, and the same was due and unpaid from the first day of January, 1895, to the fifteenth day of July, same year.

"The defendant further says that the assessed valuation of the taxable property of this defendant for the year 1894, amounted to the sum of \$703,689 according to the last assessment for territorial and county taxes for the year 1894, which was the last assessment of that kind made before the time when the said warrants were issued by the defendant.

"Further, that there is another corporation existing in the county of Eddy, territory of New Mexico, which is a subdivision of the said county with permanent and fixed boundaries and is wholly within the limits of this defendant, known as the town of Eddy; that the said town of Eddy from the first day of January to the fifteenth day of July, 1895, was indebted during said time in the sum of \$1,200, so this defendant is advised and upon such authority states the facts to be that the total valuation of the taxable property situate in the said, the town of Eddy in the last assessments for ter-

ritorial and county purposes on taxes previous to the year 1895, was \$517,281.

"This defendant further says that the said county of Eddy itself on the first day of January, 1895, from thence to and including the fifteenth day of July, same year, and at the time each of the said warrants were issued was indebted in the aggregate in the sum of not less than sixty-five thousand dollars; \$30,000 of said indebtedness being bonds, called courthouse bonds, issued in the year 1891, about \$20,000 being other bonded indebtedness, and the rest being debts on open accounts.

"This defendant further says that the total valuation of the taxable property of the entire county of Eddy according to the last assessments for territorial and county taxes for the year 1894, and which was the last of the kind previous to the time when the said warrants on which the plaintiff sues were issued, was of the amount of \$1,495,755, that this defendant is in fact a subdivision of the said county of Eddy and is and ever has been such; that the taxable property in the limits of this defendant is and ever has been bound to pay and is and ever has been burdened with its prorata part of any and all valid debts of the said county of Eddy; that the taxable property within the limits of the defendant constituted at the time the two warrants were issued, and the same were issued within thirty days after the work had been done for which they had been issued, almost one-half of the taxable property of the entire county of Eddy; that by reason of the fact that the county of Eddy at the time the said warrants were issued and at the time the work was done for which they were issued, was indebted more than is allowed by the laws of the United States, and the defendant by reason of the fact that it is a part of the said county of Eddy and the property within its limits was indebted and burdened more than allowed subdivisions of counties according to the laws of the United States, the warrants and indebtedness on which the plaintiffs cause of action is based, was and is void."

The plaintiff demurred to the answer upon the grounds following:

“First: The said plea does not state any sufficient defense to said action.

“Second: The said plea alleges that the county of Eddy has an existing indebtedness of more than four per centum limit placed thereon by the act of congress, which defense is wholly immaterial to this issue.

“Third: The defendant, being a lawful corporate body with power to contract debts, sue and be sued, can not lawfully hold its outstanding indebtedness void because of the indebtedness of the county of Eddy of which it forms a part, or of the town of Eddy which is situate in the limits of defendant.”

The court having sustained the demurrer, the defendant elected to stand upon its answer, whereupon judgment was rendered for the plaintiff in the sum of \$175 with interest and costs. The defendant thereupon brought the cause into this court on appeal.

Whether or not the court erred in sustaining the demurrer depends wholly upon the sufficiency of the answer.

In addition to the several assignments of error based upon questions not raised in the court below, and therefore not reviewable in this court, the sustaining of the demurrer is specified as error upon the ground that it is affirmatively shown by the pleadings that the funds had become exhausted and that therefore appellant could not contract the indebtedness. Appellant's argument hereon is that the first paragraph of the answer is supported by statutes, section 4 of chapter 85 of the laws of 1889, and section 22 of chapter 25, of the laws of 1891 (the latter compiled as section 1535, C. L. 1897) and being accepted as true on demurrer constitutes a legal and valid defense to the action. But on examination of the statutes we observe that the section above referred to, if not repealed by later enactments, had no application to appellant, except possibly with reference to the amount to be raised by taxation for school purposes, and

BOARD of educa-
tion: issuance of
warrants: statu-
tory inhibition.

that appellant was from the date of the creation of the indebtedness for which the warrants were issued and up to the date of their issuance governed entirely by chapter 77 of the laws of 1891 with the exception noted. Sec. 5161, Compiled Laws of N. M.; sec. 6, ch. 77, Laws of 1891. We see nowhere in the statutes up to the time of the issuance of these warrants (what is known as the 'Bateman Law,' sections 285 to 306, Compiled Laws of New Mexico 1897 not having been enacted until March 12, 1897) any inhibition upon appellant from issuing warrants evidencing indebtedness lawfully incurred, although there may not have been at the time of their issuance funds in the hands of the treasurer with which to pay the same.

Paragraph one of the answer, not presenting a legal defense, we must hold that the demurrer thereto was properly sustained.

The assignments of error, upon the action of the district court in sustaining the demurrer to the second paragraph of the answer raise a very important question and the principal one relied upon below. It is contended by appellant that because the aggregate indebtedness of the county of Eddy, the town of Eddy and the board of education of the town of Eddy already burdened the taxable property within the limits of appellant with an indebtedness in excess of four per centum of the value thereof, as ascertained by the last assessment for territorial and county taxes, the indebtedness here attempted to be created was illegal and void, as being prohibited by section four of the act of congress of July 30, 1886 (Sup. R. S., U. S., vol. 1, p. 504) known as the Federal Limitation Act, which act so far as it affects this cause we quote:

"Section 4: That no political or municipal corporation, county or other subdivision in any of the territories of the United States, shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property, within such corporation, county or

subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness and all bonds or obligations in excess of such amount given by such corporation shall be void. * * *

The appellee contends that upon the admitted facts the obligations here created are not in excess of the four per centum limitation within the meaning of the act, but "that appellant is one of the subdivisions of the territory to which congress specially delegated the power to create an indebtedness of four per cent of the assessed value of the property situate within its limits. The point made therefore requires us to construe the act to ascertain, first, whether or not where more than one "political or municipal corporation, county or other subdivision" enumerated in the federal limitation act cover in whole or in part the same territory, each such corporation may independently of the other incur an indebtedness equal to four per centum on the value of the taxable property situate within the limits so covered, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness. In the absence of controlling precedent, we must be guided by the familiar rule of constitutional construction, the congressional enactment bearing the same relation towards the territories as does a constitutional provision to a state, and by the construction given to analogous clauses in state constitutions. In construing the constitutional provisions that "no county * * * or any such city shall be allowed to become indebted * * * to an amount which * * * shall exceed ten per centum of the assessed valuation of the real estate of such county or city subject to taxation" the highest courts of the state of New York held that the city and county may each incur debt to the extent of ten per cent of such value though the lands of the city are charged with the debts of both the city and county. In the case of *Adams v. East River Sav. Inst.*, 20 N. Y. Sup. 12, the learned judge in writing the opinion in the supreme court said: "The learned counsel for the defendant contends that it was the intent of this constitutional

provision to restrain the creation of debt, either in the city or county, which taken together, would exceed ten per cent of the assessed value of the real estate lying within the county or city; or in other words, that the real estate should not bear the burden of a greater debt both for city and county purposes than ten per cent of its assessed value. The rules for constitutional construction have often been enunciated. While the whole instrument is to be considered, and the real intent should prevail over the strict letter of the provision, still that intent must be found in the language unless the letter would lead to palpable injustice, contradiction or absurdity. If the language is unambiguous, the words plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation. Effect must be given to the intent as indicated by the language employed. Especially should this be so in the interpretation of a written constitution framed deliberately and with care, and adopted by the people as organic law. This rule is peculiarly applicable to the case in hand, for the case is singularly barren of external sources from which to draw light. * * * This is the first provision of the character in any of the constitutions of this state; so we are equally without tradition or policy in this respect. We must therefore decide the case on the very words of the constitution. The language of the constitution is disjunctive * * * the literal and grammatical reading is that the county shall not be allowed to incur debt beyond a certain per cent, and that the city shall not be allowed to incur debt beyond the same per cent. Separate restrictions are imposed upon each. This is so clear to my mind as to forbid elaboration. It is only when we consider that the county includes the city and that lands in the latter are charged with the debts of both corporations, that the argument is suggested that the constitution may have intended to prescribe a single rate or limit for the aggregate of both debts. To give force to this argument it must appear that the natural and appropriate manner to restrain local debt would be by a single rate for the joint debt of county and city. We

think that the reverse of this proposition is true. * * *

The difficulty in the practical working of the construction contended for has been apparent to the learned counsel for the defendant and he has not inaptly asked, 'Is it to be a race for the diligent between the city and county, to see which shall first exhaust the combined debt limitation?' To obviate the difficulty he presents an ingenious solution of the problem. He claims that the limitations on county and city are distinct, but that in estimating the capacity of the county to contract debt, only the real estate of the county lying without the city is to be reckoned. There are several objections to this construction. It would require us to import into the constitution words that are not there; that is, after 'county' the qualification, 'excluding therefrom the real estate in any such city.' This is not admissible." In affirming the same case, the court of appeals of New York, said: "As the reasons in support of the conclusions reached have been very fully and clearly stated by the learned judge who gave the opinion at the general term, in which we fully concur, it is quite unnecessary for us to enter into any lengthy discussion of the question." *Adams v. East River, etc.*, 32 N. E. 622.

Perhaps the most strikingly analogous cases to be found are those construing a constitutional provision of the state of Illinois almost identical with the one here under consideration. It reads: "No county, city, township, school district or municipal corporation shall become indebted in excess of five per centum on the taxable property," to be ascertained in a like manner. The supreme court of the United States had this Illinois constitutional provision under consideration in the case of *Buchanan v. Litchfield*, 102 U. S. 278, where the basis for the computation of the five per centum limitation was held to be upon the whole amount of taxable property within the corporation's limits; and while the precise question here raised seems never to have been directly decided in Illinois yet by a long line of decisions the supreme court of that state construes the section in analogy with the construction given the New York constitutional provision in *Adams v. East River*

Co., *supra*; Doon Township v. Cummings, 142 U. S. 366; C. & A. R'y Co. v. People, 40 N. E. Rep. 602; Lawrence v. Co. Collector, 27 N. E. 197; Law v. People, 87 Ill. 385; Prince v. City of Quincy, 105 Ill. 143; Howel v. City of Peoria, 90 Ill. 197; Thatcher v. People, 93 Ill. 243; Fuller v. Heath, 89 Ill. 290; Peck v. Williamson & Co., 50 Pac. 236.

The case of the City of Guthrie v. Vienna Bank, 38 Pac. Rep. 4, cited does not support appellant's contention, but on the contrary, is in line with the cases above cited. Indeed, we find no cases which by any process of reasoning can be said to give force to appellant's argument. In the courts of highest resort of the states of New York, Wisconsin, South Carolina, and probably others, where we find adjudicated this precise question, arising under similar prohibitory laws, the power of each enumerated corporation to incur an independent indebtedness for its own corporate purposes not to exceed the limited rate on the assessed value of the taxable property within its limits is declared to exist; and no different inference can be fairly drawn from the reasoning of the supreme court of the United States or from any of the cases decided in the state courts above cited. Cases *supra*, and State v. Common Council, 71 N. W. Rep. (Wis.) 87; Todd v. City of Lawrence, 26 S. E. Rep. (S. C.) 682.

We perceive no reason why this construction is not applicable to the federal limitation act, and must therefore answer the first question arising thereunder in the affirmative, and hold that the municipal and political corporations enumerated therein may each independently of any other and regardless of the fact that two or more may cover the same territory in whole or in part incur an indebtedness not to exceed four per centum on the value of the taxable property therein situate, as ascertained by the last assessment for territorial and county purposes.

This brings us to the final question: Is the board of education of the town of Eddy a political or municipal corporation or other subdivision of a territory within the mean-

MUNICIPAL CORPORATION.

ing of the federal limitation act? This court at this term has decided that by section 1564, Compiled Laws of New Mexico, 1897 (Sec. 8, Ch. 77, Laws of 1891), the territorial legislature created the boards of education of the cities of this territory independent municipal corporations, for school purposes, and since that section refers in like language to boards of education of the towns of the territory, there is no escape from the conclusion that the board of education of the town of Eddy is also an independent municipal corporation. *Water Supply Company v. City of Albuquerque et al.*, 54 Pac. 973.

Paragraph 2 of the answer, for the reasons given, being insufficient as a legal defense, we hold the demurrer thereto to have been properly sustained.

The appellee having remitted thirty-nine and thirty-five hundredths dollars of the sum for which judgment was rendered below, the cause is affirmed for \$135.65, with interest and costs, and the district court of Eddy county directed to enter the judgment as here modified.

Mills, C. J., Parker and McFie, JJ., concur; Leland, J., not sitting.

[No. 790. August 28, 1899.]

TERRITORY OF NEW MEXICO, Appellee, v.
GERONIMO PINO, Appellant.

SYLLABUS BY THE COURT.

- CRIMINAL LAW—CONFLICT OF EVIDENCE—VERDICT—CONCLUSIVENESS—PROSECUTRIX—IMPEACHMENT OF CHARACTER FOR CHASTITY—EVIDENCE REQUIRED—INSTRUCTION—REFUSAL—ERROR.—1. In a criminal case, where there is neither an absence of competent evidence against the accused nor a decided preponderance in his favor, and there is a direct conflict in the testimony, the jury's verdict is a conclusive adjudication of the facts of the case.
2. The character of the prosecutrix for chastity may be impeached only by general evidence of her reputation, and not by evidence of particular instances of unchastity.

3. The refusal of the court to give an instruction properly requested by defendant which is a correct statement of the law applicable to the facts in the case and consistent with a reasonable theory other than that of defendant's guilt, and not covered by any other instruction which was given by the court is reversible error.

Appeal, from a judgment of the Fifth Judicial District Court, Socorro county, convicting defendant of rape. Reversed and remanded.

The facts are stated in the opinion of the court.

A. A. FREEMAN for appellant.

An appeal brings up for review the entire cause, both as to the law and the facts in the case. *Wiscart v. Dauchy*, 3 Dall. 326; *Crooly v. O'Brien*, 24 Ind. 325; *Wiles v. Railroad*, 24 N. Y. 443; *Owen v. State*, 35 Tex. 361; *Williams v. Townsend*, 15 Kan. 429; *Martin v. Martin*, 45 Pac. Rep. 813; *Lee v. State*, 71 Ga. 260; *Hammond v. Wadhaus*, 5 Mass. 354; *Bronson v. Caruthers*, 49 Cal. 331; *Kinne v. Kinne*, 9 Conn. 105; *Armstrong v. State*, 17 L. R. A.; *Guerno v. Ballerno*, 48 Cal. 121; *Spohn v. Railroad*, 87 Mo. 84; *Newsome v. Ly-can*, 3 J. J. Mar. (Ky.) 440; *Collins v. Railroad*, 12 Barb. 492; *New Orleans Railway Co. v. Statham*, 97 Am. Dec. 493; *Gatling v. Wilcox*, 26 Ark. 314; *Badeen v. Baca*, 2 N. M. 196; *McCarroll v. Stafford*, 24 Ark. 228; *Hall v. Page*, 443; *Shephard v. Burkhalter*, 13 Ga. 445; *Lee v. State*, 71 Ga. 260; *Kerr v. People*, 110 Ill. 627; *Graham v. People*, 115 Id. 566; *McDaniel v. State*, 53 Ga. 215; *Earp v. State*, 50 Id. 514; *Gifford v. People*, 87 Ill. 213; *Territory v. Adolphson*, 5 Pac. Rep. (Mon.) 256.

In determining the weight of testimony, this court will not be controlled by either the number of witnesses or the positiveness with which they swear, but will exercise the right to inquire into the probable truth of the testimony. *Mayne on New Trials*, sec. 226, p. 367; *Landsman v. Thompson*, 22 Pac. Rep. 1150; *Baker v. Insurance Co.*, 21 Pac. Rep. 357;

People v. Ardage, 51 Cal. 371; State v. Scholl, 32 S. W. Rep. 968; Hall v. Page, 4 Ga. 443; Shepard v. Berkhalter, 13 Id. 443.

We have a statute which requires this court to look into the entire record, "and on the facts thereon contained alone" to reverse or affirm the judgment. No case can be found in this territory in which this court has declined to reverse on the ground that it did not possess the jurisdiction. Territory v. Yarberry, 2 N. M. 257; Hicks v. Territory, 6 Id. 596; Territory v. Webb, 2 Id. 157; Territory v. Williams, 54 Pac. Rep. 232; Faulkner v. Territory, 6 N. M. 490.

The testimony in this case shows, if it shows anything, that the defendant did not commit the offense with which he was charged, but that he committed an assault on the prosecutrix. Hardtke v. State, 67 Wis. 552.

EDWARD L. BARTLETT, solicitor-general, for the territory.

No objections or exceptions appear in the record to the giving of the instructions numbered from 1 to 10, and, under the law and decisions of this court, none of such instructions can be charged as erroneous or considered in this court. Comp. Laws 1897, secs. 3139, 3145; Thompson v. Ditch & Reservoir Co., 53 Pac. Rep. 507; Hanna v. Mass., 122 U. S. 26; Padilla v. Territory, 8 N. M. 562; Territory v. Rudabaugh, 2 Id. 222; Clune v. United States, 159 U. S. 594.

It was exclusively for the jury to judge from all the facts and circumstances the interest that the witnesses had in the result, and the weight to be given to their evidence. Territory v. Edie, 6 N. M. 565; People v. Ah Loy, 10 Cal. 301; State v. Hert, 89 Mo. 591; Bailey v. Commonwealth, 82 Va. 107.

CRUMPACKER, J.—Geronimo Pino was indicted for rape. The indictment charged that the defendant on the thirtieth day of August, 1893, ravished one Andrea Cordova. The defendant was found guilty. Motions for a new trial

and in arrest of judgment being overruled, the case is brought into this court on appeal.

It is contended by the appellant that the evidence is insufficient to support the verdict of the jury, and that for this reason this court should reverse the judgment.

CRIMINAL law:
conflict of evi-
dence: verdict:
conclusiveness.

To do so, we must decide either that there is an absence of competent evidence against the accused, or a decided preponderance in his favor. *Territory v. Edie*, 6 N. M. 555. And in view of all the evidence in the case, the positive direct testimony of the plaintiff that she was ravished as charged in the indictment and of facts and testimony tending to corroborate her, and of the equally positive testimony of the defendant, and testimony tending to corroborate him that he was elsewhere at the time the offense is alleged to have been committed, neither of which state of facts involve either an absurdity of reasoning or an impossibility growing out of the very nature of things, we can arrive at no other conclusion than that in such a case the jury's verdict is a conclusive adjudication of the facts of the case, which neither the district

PROSECUTRIX:
impeachment of
character for
chastity: evi-
dence required.

nor this court should disturb. The point is made by appellant that the court below erred in not permitting proof of particular instances of unchastity of the prosecutrix to go to the jury. But the character of the prosecutrix for chastity may be impeached only by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. *Greenleaf Ev.*, sec. 214, and cases cited. And a review of the testimony in this particular shows, if anything, that the court in this case expended the rule by admitting improper testimony in defendant's behalf. The appellant contends that the instructions as given by the court tended to mislead the jury and that the court below erred in not granting a new trial. The appellee insists that these instructions can not be charged as erroneous or considered by this court for the reason that it does not appear from the record that exception to the decision of the

court in giving these instructions was taken at the time of such decision, as required by section 3145, Compiled Laws 1897. But waiving the force of this objection, we have looked carefully enough into the instructions so given to find no error. The only particular instruction pointed out as prejudicial to the rights of the appellant is as follows:

"No. 11. You may consider, gentlemen, all that the prosecuting witness said immediately after the commission of the alleged crime, as to whether she complained of the rape, or of an assault. You may consider this a circumstance affecting the question as to whether the defendant is guilty."

It is argued that because the testimony contains no evidence whatever that the prosecutrix said anything immediately after the commission of the alleged crime complaining of a rape, it was misleading to tell the jury that they might consider as a circumstance affecting the question of the defendant's guilt what she said immediately after concerning an assault. But we understand this to mean that the jury might in considering these circumstances give less credence to her story if they believed that she then complained merely of an assault instead of a rape; and we think the jury so understood it. That it was not misleading is made apparent by the

INSTRUCTION:
refusal: error.

next preceding instruction, in which the jury were told that although they may believe that the defendant assaulted the prosecutrix, yet they must find him not guilty unless they believe beyond a reasonable doubt that defendant had carnal intercourse with the prosecutrix. The appellant further insists that the court below erred in failing to give to the jury as part of the charge, certain instructions asked for by the defendant. Of these instructions we find only one to which we deem it necessary to give our attention, as follows:

"If you find that the prosecuting witness made no complaint of a rape immediately after the alleged crime, or as soon as her friends came, then this is a circumstance which you ought to consider." And to the action of the court in refusing this instruction the defendant at the time excepted.

The appellee contends that this instruction was substantially covered by the instruction numbered 11, above quoted. We do not so conclude. The given instruction had reference alone to the effect of all the prosecuting witness said immediately after the commission of the alleged offense, while the refused instruction has reference to the effect of her silence at that time on a particular point; nor do we find any other instruction in the charge covering the one refused. On the subject of rape Greenleaf says, section 212: "It is to be remembered, as has justly been observed by Lord Hale, that it is an accusation easily made, hard to be proved and still harder to be defended, by one ever so innocent, and that the credibility of the prosecutrix must be left to the jury upon the circumstances of the case which concur with her testimony; as for example, whether she is a person of good fame; whether she made complaint of the injury as soon as was practicable, or without any inconsistent delay * * * that these circumstances and the like will proportionately diminish the credit to be given her testimony by the jury." In our opinion the appellant was entitled to have this instruction given to the jury; its importance was exceeding, its bearing on a material fact in the case and its refusal prejudicial to the defendant. The rule as laid down by this court in a long line of decisions is that the general charge of the court must present the case fairly to the jury. *Territory v. O'Donnell*, 4 N. M. 210; *U. S. v. Amador*, 6 N. M. 178; *Territory v. Trujillo*, 7 N. M. 43. And while we are not here called upon to decide that the court's failure to incorporate into the general charge the proposition of law embodied in the refused instruction was reversible error, still we do decide that the defendant having requested an instruction which was a correct statement of the law applicable to the facts adduced in the case, consistent with a reasonable theory other than that of defendant's guilt and not covered by any other instruction which was given by the court, the refusal of the court to give this instruction was material error; and, as said by this court in *Territory v. Padilla*, 8 N. M. 518, "the decision of the court in holding that where

the general charge substantially covers what is requested, there is no error in refusing to give what is requested, must by inference be considered as recognizing this rule."

The judgment below will be reversed and the cause remanded with instructions to grant a new trial, and to proceed in accordance with this opinion.

Mills, C. J., Parker and McFie., JJ., concur; Leland, J., not sitting.

[No. 783. August 28, 1899.]

FIRST NATIONAL BANK OF ALBUQUERQUE,
Plaintiff in Error, v. LESSER & LEWINSON,
Defendants in Error.

SYLLABUS BY THE COURT.

- PARTNERSHIP—ADMISSION OF PARTNER—COMPETENCY—RENEWAL NOTE—FRAUDULENT TRANSFER OF PROPERTY—ATTACHMENT—AFFIDAVIT CHARGING FRAUD—PROOF—LIMIT—EVIDENCE—MATERIALITY—ASSIGNMENT—MORTGAGE—TRANSMISSION OF MONEY BY MAIL.—1. An admission or declaration made by one partner as to the firm's assets and liabilities, for the purpose of obtaining credit, is competent evidence, at least in the absence of objection on that ground, to show the amount and kind of property the firm had at that time.
2. The holder of a renewal note is entitled to the same remedies against a fraudulent transfer of property as if he were proceeding upon the original note.
 3. Where an attachment affidavit charges a fraudulent disposition of property by a firm, plaintiff is limited in his proof to that class of transfers.
 4. Without tracing any property, or the proceeds thereof, from either of defendant partners to his wife, it is immaterial, in support of the attachment affidavit charging fraudulent disposition and concealment, to show that defendants' wives became the purchasers of the firm property from the assignee after assignment for creditors.
 5. Plaintiff offered in support of its attachment affidavit evidence that the son-in-law of one defendant partner, shortly after a general assignment by the firm, paid off a mortgage on defendant's property with defendant's money. Held, not competent evidence to support the allegation of fraudulent disposition and concealment by the firm.

6. Plaintiff offered to show that defendants, shortly before attachment and assignment for creditors, transmitted money through the post-office. Held, to be competent in support of attachment affidavit.

Error, from a judgment for defendants on the attachment issue, to the Second Judicial District Court, Bernalillo County. Reversed and remanded.

The facts are stated in the opinion of the court.

A. B. McMILLEN for plaintiff in error.

Any material fact may be proved by the admission of a party to the cause. Greenlf. Ev., secs. 171 174; Stark Ev., star p. 50; Whar. Ev. 1194.

A renewal note is not payment of the debt evidenced thereby. Danl. Neg. Insts., secs. 1266a, 1266c; Bump. Fraud. Convey. (4 Ed.), sec. 296.

No right is lost by change of securities, and the holder of a new note in exchange for an old one may attack a conveyance which is fraudulent as to the old one. Wait. Fraud. Convey. (3 Ed.), sec. 89; Thompson v. Hester, 55 Miss. 656; Gordon v. Baker, 25 Ia. 34; Lowry v. Fisher, 2 Bush (Ky.) 70; Trezevant v. Terrell, 96 Tenn. 530; Miller v. Hilton, 88 Me. 429.

To sustain an attachment under our law, it is not necessary to show either the intent to hinder, delay or defraud creditors, or that the act complained of was in fraud of plaintiff. Comp. Laws 1897, sec. 2686, subdivs. 2, 3; Reed v. Pelletier, 28 Mo. 173; Douglas v. Cisna, 17 Mo. App. 44; Noyes v. Cunningham, 51 Id. 194.

Intent to defraud is sufficient though transfer is valid as to grantee. Enders v. Richards, 33 Mo. 599.

It may be fraud in law or fraud in fact. Leitensdorfer v. Webb, 1 N. M. 35; Meyer v. Block, 16 Pac. Rep. (N. M.) 620, 627; Lawson v. Frank, 108 Ill. 502, 507; Cook v. Burnham, 44 Pac. Rep. (Kan.) 447.

It is the duty of the debtor to so have his property that it may be seized on execution or other legal process for recovery of debts. Curtis v. Settle, 7 Mo. 452.

The concealment of money received from the sale of goods is as fraudulent as the concealment of the goods. *Powell v. Matthews*, 10 Mo. 49, 53; *Anderson v. O'Reilly*, 54 Barb. 620. See, also, *Grocery Co. v. Fergusson*, 29 S. W. Rep. (Ark.) 275; *Mathews v. Luth*, 45 Mo. App. 455; *Mahner v. Lee*, 70 Id.; *Perea v. Bank*, 27 Pac. Rep. 323.

CHILDERS & DOBSON for defendants in error.

Upon the question of fraudulent disposition of property and what constitutes fraud see: *Shore v. Farwell*, 9 Ill. App. 256; *Trebilcock v. Mining Co.*, 68 N. W. Rep. 330.

The proposition announced by plaintiff in error that a renewal note is not payment of a debt evidenced thereby, is not supported by authority. Nor is the proposition that a party loses no rights by change of security applicable. *Cornwall v. Gould*, 41 Pick. 444; *Huse v. Alexander*, 2 Met. 157.

The making of a general assignment under the voluntary assignment law of 1889 was not such a fraudulent disposition of defendants' property or an attempt to fraudulently convey, conceal or dispose of the same, so as to hinder, delay and defraud their creditors. *Meyers & Sons v. Black*, 4 N. M. 352; *Torlina v. Trorlicht*, 5 Id. 148; *Wearne v. France*, 21 Pac. Rep. 703. See, also, *Spencer v. Deagle*, 34 Mo. 435; *Murray v. Cason*, 15 Id. 379; *Gates v. Labeaume*, 19 Id. 17; *Dougherty v. Cooper*, 77 Id. 529; 1 *Wade on Attach.*, sec. 97; *Commission Co. v. Druley*, 41 N. E. Rep. 48.

PARKER, J.—On the fourteenth day of January, 1896, the plaintiff in error began this suit as plaintiff in the district court against Lesser & Lewinson, upon a promissory note for \$2,500 and a writ of attachment was issued in aid of said action and levied upon the stock of dry goods of the defendant. The grounds stated in the attachment affidavit were as follows: "And affiant further says that he has good reason to believe and does believe that the said defendants have fraudulently concealed and disposed of a part of their property and effects, so as to hinder, delay and defraud their

creditors; and are about fraudulently to convey, conceal and dispose of their property and effects so as to hinder, delay and defraud their creditors."

The attachment issue was tried to a jury and at the conclusion of plaintiff's evidence the court directed a verdict for the defendant. Thereupon a jury was waived in the main case and the issue tried by the court, resulting in a judgment for the plaintiff in the sum of \$3,191. Plaintiff filed a motion for a new trial in the attachment issue, which was overruled by the court and this cause comes into this court by writ of error.

Plaintiff files the following assignment of errors: 1. The court erred in directing a verdict for defendant upon the attachment issue in this cause. 2. The court erred in overruling plaintiff's motion for new trial. 3. The court erred in excluding the deposition of James E. Turtellot. 4. The court erred in refusing to admit in evidence the deed from Lesser & Lewinson to Henrietta Farmer. 5. The court erred in refusing to admit in evidence deed from Louis Lesser and wife to W. A. Maxwell. 6. The court erred in holding that a renewal of a note is an extinguishment of the debt, and that plaintiff could not question any transaction prior to the date of the note sued on, notwithstanding said note was merely a renewal of indebtedness existing long prior to the date of the transaction complained of. 7. The court erred in refusing to allow plaintiff to show the relationship of the transferees of the property to the defendants. 8. The court erred in refusing to allow plaintiffs to show that immediately after the sale by assignee, the defendants took charge of the property assigned, claiming to be acting for their wives as owners of said property. 9. The court erred in refusing to allow plaintiff to show that soon after defendants assigned for the benefit of creditors, the son-in-law of the defendant Lewinson paid off the mortgage upon the homestead of said Lewinson with the money of the said Lewinson. 10. The court erred in refusing to require Earnest A. Grunsfeld, postmaster, to produce documentary evidence called for by sub-

poena duces tecum, issued in said cause, and for other errors manifest upon the record.

1. The first assignment noticed in plaintiff's brief is the third. The plaintiff offered the deposition of several persons other than plaintiff, to whom one of defendants made statements in January, 1895, as to assets and liabilities of the firm at that time, as a basis of credit. This proof was offered for the purpose, not of showing that the statements were false, or that the debt to plaintiff or anyone else was fraudulently incurred, but for the purpose simply, of showing that the defendants had a certain amount of property at that time. It was certainly material for plaintiff to show that defendants had property which might be the subject of fraudulent disposition, else they could show no fraudulent disposition of property in support of the attachment affidavit. The evidence offered was a direct admission or declaration made by one partner as to the firm's assets and liabilities and was competent evidence, at least in the absence of objection on that ground, of the facts stated.

PARTNERSHIP:
admissions of
partner:
competency.

2. The next assignment noticed in plaintiff's brief is the fourth. Plaintiff offered the deed of Lesser & Lewinson to Henrietta Farmer, dated May 14, 1895, several months prior to the date of the note sued on, which was excluded on the theory that it was not material, it antedating the indebtedness to plaintiff. Plaintiff then offered to show that the note sued on was a renewal of a note or notes evidencing indebtedness incurred long prior to the conveyance, but the court still adhered to its ruling. In this we think the court committed error. It may be stated generally, that a note taken for a precedent debt is not regarded as payment of it, unless the parties so agree. 2 Daniel's Neg. Instr. [4 Ed.], sec. 1260; 16 Am. and Eng. Ency. of Law, p. 873.

RENEWAL note:
fraudulent
transfer of
property.

And a note given in renewal of a former note is not regarded as payment of the former, in the absence of an agreement to that effect. 2 Daniels, Neg. Ins. [4 Ed.], sec. 1266,

1266a, 1266c; 16 Am. and Eng. Ency. of Law, p. 876. This principle has been applied in cases of fraudulent conveyances, like the one under consideration, and it is laid down that a party loses no rights by change of security, and the holder of a new note in exchange for an old one may attack a conveyance which is fraudulent as to the old one. Bump. Fraud. Convey. [4 Ed.], sec. 507; Wait Fraud. Convey. [3 Ed.], sec. 89; McLaughlin v. Bank of Potomac, 7 How. 220; Thompson v. Hester, 55 Miss. 656; Gardner v. Baker, 25 Iowa 343; Lowery v. Fisher, 2 Bush (Ky.) 70; Tresevent v. Terrell, 96 Tenn. 530; 33 S. W. Rep. 109; Miller v. Hilton, 88 Me. 429; 34 Atl. Rep. 266; Lee v. Hollister, 5 Fed. Rep. 752. It follows that the plaintiff was a creditor at the time of the conveyance and the deed should have been admitted.

The plaintiff then offered several deeds of the individual members of the firm of Lesser & Lewinson, and their wives,

conveying property not shown to be firm property, and we think the court properly excluded them. This action was brought against the

ATTACHMENT:
affidavit charging fraud: proof: limit.

firm of Lesser & Lewinson as such. It is true that under our statute, section 2943, Compiled Laws of 1897, the judgment might be enforced against the firm property and that of each member thereof, they having appeared in the action. But the allegations of the affidavit for attachment are too narrow to admit of this proof. The affidavit, after stating that Lesser & Lewinson are indebted, etc., further states that "the said defendants have fraudulently concealed and disposed of a part of their property," etc., "and are about fraudulently to convey, conceal and dispose of their property and effects," etc. However important it might be to plaintiff to show these transfers, no such disposition of property is alleged and proof of the same would support no allegation of the attachment affidavit. The plaintiff having limited by his pleading the class of transfers complained of, it would be incompetent for him to prove other classes of transfers.

3. The eighth assignment refers to the exclusion of evidence that the wives of the defendants became the purchasers

FRAUDULENT
transfer of prop-
erty: evidence:
materiality.

of the stock of merchandise from the assignee, and the defendants took charge of the same thereafter as agents for their wives. Without tracing any property, or the proceeds thereof from either of the defendants to his wife, I can not see how the evidence would be material as supporting the allegation of fraudulent disposition or concealment.

ASSIGNMENT:
mortgage:
evidence:
competency.

4. Plaintiff offered to show that after the attachment and assignment, the son-in-law of Lewinson paid off a mortgage upon Lewinson's homestead with Lewinson's money. This it seems was incompetent for the same reasons that individual deeds of the partners were incompetent and was properly excluded.

TRANSMISSION of
money by mail:
evidence:
competency.

5. The plaintiff asked an order upon the postmaster at Albuquerque to produce his record to show what moneys had been sent by the defendants through this department prior to the attachment. This the court refused to make, and the plaintiff was not permitted to show by secondary evidence the contents of the postoffice records. This we think was error. This testimony tended to support the affidavit of fraudulent concealment or disposition of defendants' property.

For the errors assigned, the judgment of the lower court must be reversed and the cause remanded with instructions to grant a new trial, and it is so ordered.

Mills, C. J., and McFie, J., concur.

[No. 789. August 29, 1899.]

THE UNITED STATES OF AMERICA, Plaintiff in
Error, v. GUMM BROTHERS et al., Defendants in Error.

SYLLABUS BY THE COURT.

TROVER—CUTTING TIMBER FROM PUBLIC LANDS—ABATEMENT—DEMURRER—PARTNERS—INDIVIDUAL LIABILITY OF—WEIGHT OF EVIDENCE—JURY QUESTION—PLEA OF LICENSE—BURDEN OF PROOF—EVIDENCE—RULES AND REGULATIONS OF SECRETARY OF INTERIOR—INSTRUCTION EMBODYING—REFUSAL—ERROR—JUDICIAL NOTICE.—1. Where the United States sues in trover, for damages for the cutting and converting to the defendants use timber cut from the public lands, defendants are sued individually as well as under the firm name of Gumm Bros., it is not error for the court to overrule a demurrer to a plea in abatement denying existence of such firm, and alleging existence of firm under another name.

2. In such case a partner may be sued individually without regard to the partnership.
3. Where defendants plead a license to cut and convert such timber the burden of the proof is upon defendants upon that issue.
4. In order to establish license under the act of congress approved June 3, 1878, it is necessary to prove compliance with section 1 of the act, and also the rules and regulations prescribed by the secretary of the interior as required by said section.
5. Where the defendant introduces competent evidence tending to prove license, it is error to refuse instructions requested by the plaintiff embodying the rules prescribed by the secretary of the interior.
6. The court, in such case will take judicial notice of such rules and regulations.
7. Where competent evidence sufficient to sustain a verdict has been given to the jury tending to prove the illegal cutting and appropriation of timber of the United States, and by the defendant, competent evidence tending to justify such acts, it is for the jury to determine the weight of such evidence, and it is error for the court to take the case from the consideration of the jury.

Error, from a judgment for defendants, to the Fifth Judicial District Court. Reversed and remanded.

The facts are stated in the opinion of the court.

W. B. CHILDERS for the United States.

Any person or corporation, who seeks to justify the cutting of timber from the public lands by showing a license under the law, must show a compliance therewith. *United States v. Railroad*, 40 Fed. Rep. 419; *Railroad v. Lewis*, 162 U. S. 376.

The presumption is that the cutting, in the absence of evidence, is illegal. *United States v. Cook*, 19 Wall. 591; *Railroad Co. v. Lewis*, *supra*.

It is only lawful to cut timber upon the public mineral lands of the United States in accordance with the act of congress and the rules and regulations of the secretary of the interior. *United States v. Reeder*, 69 Fed. Rep. 965.

The burden of proof to show that the timber was lawfully cut was upon the defendants. *Stone v. United States*, 64 Fed. Rep. 667; *United States v. Baxter*.

It is not necessary, even in a criminal case, to allege or prove that defendant was not justified under any of the land laws of the United States in cutting the timber. *United States v. Stone*, 49 Fed. Rep. 848.

Nor is it necessary to introduce in evidence the rules and regulations of the secretary of the interior; this court will take judicial notice of them. *Caha v. United States*, 152 U. S. 211-221.

S. B. GILLET for defendants in error.

The court did not err in instructing a verdict for defendants. 2 *Thomp. on Tr.*, sec. 2242; *Chandler v. Van Roeder*, 24 *How.* 227; *Wilder v. Wheeldon*, 56 *Vt.* 344; *Harris v. Woody*, 9 *Mo.* 113; *St. Johnsbury v. Thompson*, 9 *Atl. Rep.* 571. See, also, 2 *Thomp. on Tr.*, sec. 2245; *Tyson v. Yawn*, 15 *Ga.* 491; *Boland v. Railroad*, 36 *Mo.* 484; *Meyer v. Railroad*, 40 *Id.* 151; *Charles v. Patch*, 87 *Id.* 450, 462; *Alexander v. Mining Co.*, 3 *N. M.* 255; *Lockhart v. Wills*, 50 *Pac. (N. M.)* 318; *Ellis v. Railway Co.*, 150 *U. S.* 245; *Railroad Co. v. Houston*, 95 *Id.* 697; *Schofield v. Railroad*, 114 *Id.*

615; Railroad v. Converse, 139 Id. 469; Hildebrand v. Lillis, 51 Pac. Rep. 1008; Bank v. Insurance Co., 105 U. S. 783; Richardson v. Boston, 19 How. 263.

The burden of proof was on plaintiff. Denver & Rio Grande R. R. Co. v. United States (N. M.), not reported; United States v. Routledge, 8 N. M. 385.

It was not incumbent upon defendants to show that there were mines upon the land from which timber was cut, before they could claim the protection of the license. United States v. Edwards, 38 Fed. Rep. 812; United States v. Mining Co., 40 Id. 415.

Plaintiff having sued Gumm Brothers and the evidence showed there was no such firm, it would have been error to have allowed plaintiff to recover. Dicey on Par. 149, rule 115; 1 Chitt. Pl. 8, 19, 305, 307; Vinal v. Oil & Oil Land Co., 110 U. S. 215; Heckla v. Ore & Iron Co., 28 N. Y. 34; Cushing v. Marston, 12 Cush. 431; Fish v. Gates, 133 Mass. 441; Halliday v. Doggett, 6 Pick. 359; Page v. Wolcott, 15 Gray, 536; Dunker v. Schlotfield, 49 Ill. App. 652; Seeley v. Schenck, 2 N. J. Law, 71; Reed v. Railroad, 105 Mass. 303; Chouteau v. Rait, 20 Ohio 132.

McFIE, J.—At the May term, 1897, of the district court for the Fifth judicial district, this cause was tried before Judge Hamilton and a jury, and under the instructions of the court, verdict was rendered for the defendants.

A motion for a new trial was filed by the plaintiff in error and the same being overruled, judgment was rendered against the plaintiff for costs. To reverse this judgment the plaintiff below has brought the cause into this court by writ of error.

The United States brought suit in trover against John, Wallace, Peter and Joseph Gumm, as individuals and also as partners doing business under the firm name of Gumm Brothers, alleging that the defendants converted to their own use logs, lumber and timbers, cut and manufactured from and out of trees theretofore standing, growing and being upon certain

TROVER: cutting
timber from pub-
lic lands: abate-
ment: demurrer.

lands of the plaintiff, situate in said district, and alleging plaintiff's damages to be ten thousand dollars, for which amount plaintiff prays judgment.

There was personal service by the marshal, and Warren, Fergusson and Gillett entered appearance as attorneys for defendants.

On the fourth day of May, A. D. 1897, a plea in abatement was filed by the defendants, denying that the defendants were partners or transacted business under the firm name of Gumm Brothers; denying the existence of any such firm as Gumm Brothers, and alleging the existence of the White Oaks Building & Lumber Company, a firm composed of John Gumm, Joseph Gumm, Wallace Gumm and Elmer Gumm, and that they have always transacted business under the name of the White Oaks Building & Lumber Company since the organization of the partnership.

To this plea a demurrer was interposed, upon the ground that inasmuch as the defendants were sued individually as well as members of a copartnership, the plea does not constitute a defense.

The court sustained the demurrer, and to this action the defendants duly excepted. Section 2946, Compiled Laws of 1897, is as follows:

"All contracts, which by the common law are joint only, shall be held and construed to be joint and several; and in all cases of joint obligations or assumptions by partners and others, suit may be brought and prosecuted against any one or more of the parties liable thereon, and when more than one person is joined in any such suit, such suit may be prosecuted, and judgment rendered against any one or more of such defendants."

In the case of *Curran v. Boot & Shoe Company*, 8 N. M. 417, it was held that one member of a copartnership could be sued, and that the firm name was "nothing more than *descriptio personae*."

Under the laws of this territory, therefore, all contracts and obligations are several and in case of copartnership, each

PARTNERS: individual liability of.

member is severally liable and may be sued separately, and judgment may be taken against him regardless of the existence of the partnership or the liability of the other copartners.

That the statute above referred to applies to this case, which is an action ex delicto, may well be doubted, but even so, it will be found that under the common law the result is the same.

Parsons on Partnership [3 Ed.], p. 171, states the doctrine as follows:

"It is to be observed that, although all the partners may be liable for a tort, and all may be sued jointly, they may also be sued severally; for, in law, all torts, however joint, and whether constructive or actual, are several. It is therefore no answer for a defendant sued in tort to say that others were guilty with him." Cooley on Torts [2 Ed.], p. 155.

The plea discloses the fact that Joseph Gumm, one of the defendants, was a member of the White Oaks Building & Lumber Company, therefore, he was a proper party defendant to the suit in any event, but as the parties were sued and served individually, their liability became a matter of proof, and the denial of the existence of the firm of Gumm Brothers, or alleging the existence of the firm of the White Oaks Building & Lumber Company, was immaterial, did not constitute a defense, and the court very properly sustained the demurrer to the plea.

The defendants plead, over first pleading, not guilty, and as trial progressed, by leave of the court, a plea of license was filed over the objection of the plaintiff.

When the evidence was all in, the plaintiff requested the court to give to the jury written instructions one to twelve, inclusive, and the defendants moved the court to instruct the jury to find for the defendants.

The court refused to give the jury any of the instructions requested by the plaintiff, sustained the motion of the defendants, and instructed the jury to find the issues in favor of the defendants.

Exceptions were saved to the action of the court, by the plaintiff, and the jury returned a verdict in favor of the defendants.

A motion for a new trial was made and overruled, and a judgment was entered against the plaintiff for costs.

Several errors have been assigned, and such of them as are deemed necessary to a proper disposition of this case will now be considered.

The first error assigned, is that "The court erred in instructing the jury to find a verdict in favor of the defendants."

This court has repeatedly decided, that where there is no evidence to sustain a verdict against a defendant, or where the

WRIGHT of evidence: jury question. court would be compelled to set aside a verdict against a defendant, if returned, the court has power to direct a verdict in favor of the defendant.

Candelaria v. A. T. & S. F. R'y Co., 6 N. M. 266; *Improvement Co. v. Munson*, 14 Wall. 442; *Pleasant v. Font*, 22 Wall. 116; *Herbert v. Butler*, 96 U. S. 319; *Bowditch v. Boston*, 110 U. S. 16; *Griggs v. Houston*, 104 U. S. 553; *Randal v. Railroad Co.*, 109 U. S. 478; *Railroad Co. v. Jones*, 95 U. S. 439; *North Pennsylvania Railroad Co. v. Commercial National Bank*, 123 U. S. 727.

In this case there was considerable evidence given on the part of the plaintiff, tending to show that a large amount of timber was cut from the public lands of the United States described in the declaration; that the same was sawed into lumber by the mill owned in part by the defendant, Joseph Gumm; and that a large amount of such lumber was converted to the use of the defendant Joseph Gumm and his associates, as the same was sold by them and the proceeds of such sales appropriated to their own use and benefit.

There was also considerable evidence on the part of the defendants tending to show that the lumber sold by Joseph Gumm, and associates, under the firm name of the White Oaks Building & Lumber Company, was purchased by citizens of the United States, and residents of the territory, and that the

timber cut was taken from mineral lands, all of which was competent under defendants plea of license.

It is true that there appears to be no evidence whatever of the existence of the firm of Gumm Brothers, nor that the defendants were copartners doing business under such firm name.

The plaintiff called Joseph Gumm as a witness, and he testified there was no such firm, and this is conclusive evidence upon that point. Nor is there any evidence in the record tending to show that John, Wallace or Peter Gumm individually had any connection with either the cutting of timber, or disposing of the lumber complained of, nor were either of them members of the White Oaks Building & Lumber Company. The instruction of the court was correct, therefore, as to the firm name of Gumm Brothers, John, Wallace and Peter Gumm.

It is different, however, as to Joseph Gumm, who admits he was a copartner of the White Oaks Building & Lumber Company, which is shown to have cut the timber and sold the lumber. The suit being maintainable against him, evidence tending to establish the cutting of timber from the public lands, by a mill of which he was a co-owner, and the conversion of the product to his use, at least in part, and also evidence tending to show license or authority to cut and dispose of such timber, was competent evidence, was given before the jury, and it was for the jury to determine the weight and value of this evidence under proper instructions from the court, and render a verdict thereon, as between the plaintiff and the defendant, Joseph Gumm.

As to the defendant, Joseph Gumm, this case was not within the rule laid down in the authorities above referred to, and the court erred in giving the jury instructions complained of in the first assignment of error.

The second error assigned, is "The court erred in refusing to give the instructions asked for by the plaintiff."

As we have found that there was competent evidence for the consideration of the jury, if the instructions requested

by the plaintiff were proper, there was error committed by the court in refusing to give such of them as were correct. The court was requested to charge as follows:

“Fourth. The court instructs the jury that the defendants claimed a right to cut timber upon the lands of the United States under and by virtue of the statutes permitting bona fide residents of the Territory of New Mexico, and of other states and territories, to fell and remove timber from the public lands of the United States, except for mineral entry, for building, agricultural or other domestic purpose. The court instructs the jury that the laws of the United States permit timber to be cut upon such public lands as are mineral in character, and which are not subject to entry under the existing laws of the United States, except for mineral entry provided that the person so cutting timber does so subject to such rules and regulations as the secretary of the interior has prescribed for the protection of timber and the undergrowth growing upon such lands. The court instructs the jury that it is incumbent upon the defendant to make out this defense, that the right to cut timber upon such lands is a privilege or license, or that the burden of proof is upon the defendants to show that the timber so cut was cut under and in accordance with the conditions and terms of the statute referred to.”

“Fifth. The court further instructs the jury that the burden of proof is upon the defendants to show that they are bona fide residents of the territory of New Mexico, or of the district in which such timber is situated at the time of the cutting. Second. That the land from which said timber was cut was mineral land and was not subject to entry under the existing laws of the United States, except for mineral entry. Third. That they have complied with the regulations described by the secretary of the interior for the protection of the timber and undergrowth growing upon said lands, and for other purposes.”

“Ninth. The court further instructs the jury that the secretary of the interior has prescribed regulations governing the cutting of timber upon the public lands in such cases as

this, that said regulations provide that the land from which timber is felled or removed under the provisions of the act must be known to be of a strictly mineral character and that it is not subject to entry under the existing laws of the United States, except for mineral entries, and that said regulations further provide that such timber shall not be disposed of to any other than citizens and bona fide residents of the state and territory where such timber is cut nor for other purpose than legitimate use of such purchaser for the purpose mentioned in said act; that is to say, for building, agricultural, mining or other domestic purposes. That said regulations further provide that every owner or manager of a saw-mill or other person felling or removing timber under the provisions of this act, shall keep a record of all timber so cut and removed, stating the time when cut, the names of the parties cutting the same or in charge of the work, and describing the land from whence cut, or legal subdivisions if surveyed, or as near as practicable if not surveyed, with a statement of the fact upon which it is claimed that the land is mineral in character, and shall state also the amount and quantity of lumber manufactured therefrom, together with the names of the parties to whom any such timber or lumber is sold, dates of sale and the purpose for which sold, and shall not sell or dispose of such timber or lumber made from such timber without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining or other domestic purposes within the said state or territory; and further requires that every such purchaser shall further be required to file with said owner or manager a certificate under oath that he purchased such timber or lumber exclusively for his own use and for the purposes aforesaid."

The court was requested by the plaintiff, in these instructions to inform the jury that the burden of proof was upon the defendants to establish their license of lawful right to cut and dispose of the plaintiff's timber, and second, that it devolved upon the defendants to show compliance with the

PLEA of license:
burden of proof.

laws of the United States, and the regulations prescribed by the secretary of the interior, as directed by the laws of the United States, in regard to cutting and disposing of timber from the public lands.

The burden of the proof was upon the plaintiff to establish, by a preponderance of the evidence, the cutting and conversion of timber by the defendants, or some of them, from the public lands, but the burden of proof was undoubtedly upon the defense to show the right to so cut and dispose of such timber. This right is designated a license, in this case, and the defense recognized the necessity of showing the right by pleading license. Having pleaded license to cut and dispose of such timber, the burden of proof was upon the party pleading license as a defense, to maintain the plea and thus excuse the act. It should be so for the further reason, that some of the facts constituting this license are within the knowledge of the defense only, and therefore the plea can not be maintained without their disclosure by the defendants.

The ninth instruction sets out, substantially, the rules and regulations prescribed by the secretary of the interior under

EVIDENCE: rules
and regulations
of secretary of in-
terior: instruction
embodying:
refusal: error.

the act of congress in regard to the cutting and disposing of timber upon the public lands. It will be observed that, under these rules and regulations the owner or manager of a saw-mill or other person felling or removing timber upon or from the public lands, is required to keep a record of all timber so cut or removed, stating the time when cut, the names of the parties cutting or in charge of the work; describing the land from which it was cut by legal subdivisions, or as near as practicable if unsurveyed; the character of the land; how much lumber was manufactured; how much sold, and to whom; and required that none shall be sold unless a written agreement is taken from the purchaser that the same shall not be used except for building, agricultural, mining or other domestic purposes, within said territory or state, as the case may be. It is apparent that such information is peculiarly within the knowledge of the defendants sued for cut-

ting and removing such timber, and, as such facts are necessary of a license to cut or remove timber from the public lands, it was for the defendants and not the plaintiff to establish them. *Northern Pacific R. R. Co. v. Lewis*, 162 U. S. 376.

The defendants plead license and seek to justify under the act of congress approved June 3, 1878, 20 United States Statutes, chapter 150, page 88. The first section of this act is as follows:

“That all citizens of the United States, and other persons, bona fide residents of the state of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands; said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber, and of the undergrowth growing upon such lands, and for other purposes: Provided, the provisions of this act shall not extend to railroad corporations.”

The defendants contend, that in order to show license it was not necessary for them to show compliance with the rules and regulations prescribed by the secretary of the interior under the above act, and they further insist that such rules and regulations must be proven as any other fact in the case. In the case of *Caha v. United States*, 152 U. S. 211-221, it was held that the courts will take judicial notice of rules and regulations prescribed by the department of the interior under act of congress, and therefore it is not necessary to prove them. It is true the rules and regulations in that

JUDICIAL NOTICE.

case related to local land offices, but that is immaterial as they were prescribed under an act of congress as in this case.

The supreme court of Montana in a well considered case involving a construction of the identical rules and regulations prescribed by the act of congress above set out held that the courts of that state take judicial notice of them.

Counsel for defendants cited the case of the Denver & Rio Grande Railroad Co. v. United States, 54 Pac. 336, decided by this court at the present term, as holding that such "rules and regulations" must be proven as any other fact. An examination of the case shows that the court did not so decide. Similar rules and regulations were not before the court, or involved in the case, and the decision of the court was as to a special act of congress, and not rules and regulations required to be perscribed under a general act of congress.

The law seems to be well settled, that it is only lawful to cut timber upon the public mineral lands of the United States in accordance with the act of congress and the rules and regulations prescribed by the secretary of the interior under the act, and that the burden of proof to show that the timber was lawfully cut or removed is upon the defendant. 69 Fed. Rep. 965.

In the case of the Northern Pacific Railroad Company v. Lewis, 162 U. S. 376, the court says:

"The absolute ownership of these lands being at the time in the United States, it had as owner the same right and domain over them as any owner would have. No one had the right to enter upon the lands; no one had the right to cut a stick of timber thereon, without its consent. Any one so going upon the lands and cutting timber would be guilty of the commission of an act of trespass. The government, however, chose to make some exceptions in favor of certain classes of people to whom were given the right to cut timber for certain purposes: First. They were to be citizens of the United States. Second. Bona fide residents of the state or territory mentioned in the act. Third. They were to be permitted to fell and remove any timber or trees growing or

being on the public lands, provided they were mineral, and not subject to entry under existing laws of the United States; and they were authorized and permitted to fell and remove such timber only for building, agricultural, mining or other domestic purposes. The cutting and removing were to be done under rules and regulations prescribed by the secretary of the interior. Outside of these exceptions, there was no right in any person to cut a particle of timber on these public lands of the government."

These exceptions which may be set up and relied upon as a license and defense in an action by the United States for cutting and disposing of timber from the public lands, are very clearly pointed out in the cases above referred to, and from these authorities and others which might be cited, compliance with the rules and regulations prescribed by the secretary of the interior is just as essential in order to constitute license as is compliance with any part of the act of congress above quoted, and there can be no license which would justify such cutting and appropriation of timber unless compliance with the rules and regulations as well as the statute is shown by the defendant.

There was evidence given as to a partial compliance with the statute and rules, but partial compliance does not constitute license or a defense in a civil action, for cutting or removing of timber from lands of the United States is presumed to be illegal. *United States v. Cook*, 19 Wall. 591; *N. Pac. R. R. Co. v. Lewis*, 162 U. S. 376; *United States v. Reeder*, 69 Fed. 965. And to justify the act and escape liability, full compliance with the act of congress and the rules and regulations defining under what circumstances such timber may be lawfully cut or removed, must be shown.

Defendants contend that these rules and regulations apply to criminal cases only, but we are of the opinion that they apply to both civil and criminal cases.

In the *United States v. Murphy*, 32 Fed. Rep. 378, the court says: "Under the provisions of section 2461, whoever cuts and removes timber from public lands, which includes

all that the government holds title to, must be prepared to show, when indicated or sued as a trespasser, lawful authority for his act."

It seems clear that the court erred in refusing the instructions above set out, and that the second error is well assigned.

The motion for a new trial based upon these assignments, should have been allowed and a new trial granted.

The judgment of the court below will be reversed and the cause remanded with instructions to the court below to set aside the judgment, grant a new trial, and proceed in accordance with this opinion.

Judgment reversed and cause remanded at defendants' costs.

Mills, C. J., Parker and Crumpacker, JJ., concur; Leland, J., absent.

[No. 799. August 29, 1899.]

TOWN OF ROSWELL, Appellant, v. F. DOMINICE,
Appellee.

SYLLABUS BY THE COURT.

STREET IMPROVEMENTS—PETITION—SPECIAL ASSESSMENT—VALIDITY.—A petition by the owners of at least one-half of the property fronting upon a street in a municipal corporation, is a jurisdictional prerequisite to the validity of a special assessment upon such abutting property for street grading and improvement.

Appeal, from a decree for defendant, from the Fifth Judicial District Court, Chavez County. Affirmed.

The facts are stated in the opinion of the court.

G. A. RICHARDSON for appellant.

The town of Roswell, as a municipal corporation, had full power and authority to levy and make a special assessment

on property within its borders for the improvement of its streets, for draining its lots and blocks, and grading and graveling its highways. Laws 1881, chap. 32, sec. 13; Laws 1893, chap. 78, sec. 3; Laws 1897, sec. 2415; Laws 1897, sec. 2488; Comp. Laws 1884, sec. 1635; 2 Dill. Munic. Corp., sec. 752; Laws 1897, sec. 2402, sub-secs. 76, 80, 81, 82; 10 Am. and Eng. Ency. Law, 279; Cooley on Tax. [2 Ed.] 616.

Property frontage is the proper basis for a special assessment, and the cost is not always borne by those only who are specially benefited. 10 Am. and Eng. Ency. Law, "Local Improvements;" Crawford v. People, 82 Ill. 557; Van Tassel v. Jersey City, 37 N. J. 128; Mix v. Shaw, 106 Ill. 425; White v. People, 94 Id. 604; Springfield v. Green, 120 Id. 269; Shaw v. Dennis, 5 Gil. (Ill.) 405; Petition of Lowden, 89 N. Y. 548; 10 Am. and Eng. Ency. Law, 206; Dickson v. Racine, 65 Wis. 306.

JOHN FRANKLIN for appellee.

Section 2488, Comp. Laws 1897, from which appellant claims to derive its power to levy the assessment, is unconstitutional and void. Cooley, Const. Lim. 55; 1 Dill. Munic. Corp., sec. 94; People v. Mayor, etc., 4 N. Y. 427; Keith v. Wilson, 44 N. E. Rep. (Ind.) 13; Morse v. Westport, 33 S. W. Rep. (Mo.) 182; Barnes v. Dyer, 56 Vt. 469; Rubber Co. v. Commissioners, etc., 9 Vr. (N. J. Law) 190; State v. Newark, 8 Id. 415; Stuart v. Palmer, 74 N. Y. 183. See, also, Bradley v. Fallbrook, Irr. Dist., 68 Fed. Rep. 948; Davidson v. New Orleans, 96 U. S. 104; Hagar v. Reclamation Dist., 111 Id. 711; 24 Am. and Eng. Ency. of Law 61; Thomas v. Gain, 35 Mich. 162.

No such petition having been presented to the board as is required by the Laws of 1891, asking for the passage of ordinance No. 54, the same is void. Zeigler v. Hopkins, 117 U. S. 683; 2 Dill. Munic. Corp., secs. 800, 801; Holland v. Baltimore, 11 Md. 186; Andrey v. Dallas, 35 S. W. Rep. 726;

Miller v. Amsterdam, 43 N. E. Rep. (N. Y.) 632; Keyser v. District of Columbia, 3 App. Dist. Col. 31.

Special benefit to the property in front of which the improvement is made is the only source of the power of municipal corporations to assess the costs of such improvements on such property. 2 Dill. Munic. Corp., secs. 752, 761, 934, 937; 24 Am. and Eng. Ency. of Law 65; Barnes v. Dyer, 56 Vt. 469; Hagar v. Reclamation Dist., *supra*; Davidson v. New Orleans, 96 U. S. 104; Dallas v. Emerson, 36 S. W. Rep. 304; State v. Brill, 59 N. W. Rep. 989; Baltimore v. Brick Co., 80 Md. 458; Sharp v. Spier, 4 Hill 82; Findlay v. Frey, 51 Ohio St. 390; Music Hall Ass'n v. Clemens, 12 Ind. App. 646; Wright v. Boston, 9 Cush. 232, 241.

PARKER, J.—This is an action brought by the town of Roswell against the appellee to collect a special tax levied by said town against the property of appellee as his share towards the expense of improving and grading certain streets in said town. The district court dismissed the complaint for the reason, among other things, that the tax assessed was without the petition of the owners of at least one-half of the property fronting on such improvement. Appellant assigns for error among other things this action of the court below.

The town of Roswell is incorporated under the general incorporation laws for towns and villages. Sub-section 82 of section 2402 of the Compiled Laws of 1897, applicable to all municipal corporations, provides:

“That the levying of assessments provided for by the two preceding sections (street improvements) shall be under a general ordinance prescribing the manner thereof and upon petition of owners of at least one-half of the property frontage of the block fronting on the improvement to be made, and be subjected to the provisions of section two thousand four hundred and fifteen * * *

Sec. 2415, Comp. Laws of 1897, provides:

“No street or highway shall be opened, straightened or widened, nor shall any other improvement be made which will require proceedings to condemn private property without the

concurrence in the ordinance or resolution directing the same of two-thirds of the whole number of the members elected to the council or board of trustees, and the concurrence of a like majority shall be required to direct any improvement or repair of a street or highway, the costs of which is to be assessed upon the owners unless two-thirds of the owners to be charged therefor shall petition in writing for the same."

In this case the board of trustees of the town of Roswell passed the ordinance levying the tax in question by a two-thirds vote, and counsel for appellant contend that section 2415 dispenses with any petition from the owners under such circumstances, but we do not so understand these statutes, sub-section 82 of section 2402 above quoted, after requiring a petition of at least one-half of the abutting owners, also further requires in accordance with section 2415, a concurrence of two-thirds of the whole number of members elected to the council or board of trustees, unless two-thirds of the abutting owners petition for the improvement, in which latter case a fair majority of the council or board of trustees, we understand, might legally pass the ordinance.

It appears from the record that no petition of the owners of any portion of the abutting property was made to the board of trustees of the town of Roswell for the improvement made by it, as required by the statute; and it simply remains to be determined what effect the same has upon the tax levy.

STREET improve-
ments: petition:
special assess-
ment: validity.

"Municipalities having no inherent power in these cases (special assessments), it is necessary to the validity of their action that they keep closely to the authority conferred. Their ordinances and resolutions must be adopted in due form of law, and they must keep within them afterwards. They can bind taxpayers only in the mode prescribed and can substitute no other. Their legislative action, if properly taken, is conclusive of the property of the proposed improvement, and of the benefits that will result, if it covers the subject, but it will not conclude as to the preliminary conditions to any action at all, such for example,

as that there shall be in fact such street as they undertake to provide for the improvement of, or that the particular improvement shall be petitioned for or assented to by a majority or some other defined proportion of the parties concerned. This latter provision is justly regarded as of very great importance, and a failure to observe it will be fatal at any stage of the proceedings. * * * Cooley on Taxation [2 Ed.], p. 656.

This principle seems to be universally recognized. 2 Dillon on Municipal Corporations [4 Ed.], sec. 800; 24 Am. and Eng. Ency. of Law, 54; Holland v. Moyer, etc., 11 Md. 186; Mulligan v. Smith, 59 Cal. 206; Seigler v. Hopkins, 117 U. S. 683; Keese v. Denver, 10 Col. 112; Miller v. City of Amsterdam, 43 N. E. Rep. (N. Y.) 632.

It is to be further noted that no question of estoppel arises in this case, appellee being a non-resident and no notice having come to him until he was requested to pay the tax after the improvement had been completed.

• It follows that for want of the petition of abutting property owners, the assessment was void as to all such owners, at least as have not voluntarily paid the assessment.

In view of the foregoing conclusions, it becomes unnecessary to examine the other interesting and important questions raised by the remaining assignments of error, and discussed in briefs of counsel.

The judgment of the lower court will be affirmed with costs; and it is so ordered.

Mills, C.J., McFie and Crumpacker, JJ., concur; Leland, J., not sitting.

[No. 796. August 30, 1899.]

TERRITORY OF NEW MEXICO, Appellee, v. MANUEL
MALDONADO et al., Appellants.

SYLLABUS BY THE COURT.

CRIMINAL LAW—RAPE—EVIDENCE—ADMISSIBILITY.—In prosecution for rape, the prosecutrix may be asked whether she made complaint of the injury, when and to whom, and the person to whom she complained may be called to prove the fact; but the particular facts stated by the prosecutrix are not admissible in evidence, except when elicited on cross-examination, or by way of confirming her testimony after it has been impeached.

Appeal, from a judgment of the Fourth Judicial District Court, San Miguel County, convicting the defendants of rape. Reversed and remanded; Leland, J., dissenting.

The facts are stated in the opinion of the court.

R. E. TWITCHELL for appellants.

It was error to permit the prosecutrix to testify as to the particulars of her conversation and acts at the house of Cruz Segura subsequent to the alleged commission of the crime. It was also error to permit Romero to testify as to the details of his conversations with the prosecutrix at the time she made complaint to him as an officer. Ros. Crim. Ev. [8 Ed.] 45; Baccio v. People, 41 N. Y. 265; People v. Mayes, 66 Cal. 597; Johnson v. State, 21 Tex. App. 368; 3 Greenlf. Ev. 213; 1 Phil. on Ev. 233; 1 Russell on Crimes 688; People v. Hulse, 3 Hill 316; People v. McGee, 1 Denio 19; Stephens v. State, 11 Ga. 225; Whar. on Crim. Law, 1150; Oleson v. State, 38 Am. Rep. 366; Kirby v. Territory, 28 Pac. Rep. 1134; People v. Hicks, 56 N. W. Rep. 1102; People v. Gage, 28 Id. 835; Pefferling v. State, 40 Tex. 486; Bruce v. State, 21 S. W. Rep. 681; Reddick v. State, 34 Id. 274; State v. Carroll, 67 Vt. 447; State v. Thompson, 38 Ind. 40; State v. Laughlin, 18

Ohio 99; State v. Langford 14 Soth. Rep. 181; Brogy v. Com., 10 Grat. (Va.) 722; State v. Jones, 61 Mo. 232; State v. Ivins, 7 Vroom 233.

The court erred in permitting Romero to testify that the prosecutrix had identified the defendants at the jail as the men who had assaulted her. Reddick v. State, supra, 276.

The statements made by the prosecutrix to the wife of Cruz Segura and to the policeman, Romero, were not a part of the res gestae. 1 Bish. Crim. Proc. 659; McKee v. People, 36 N. Y. 113, 116; State v. Wagner, 61 Me. 178; Patton v. People, 18 Mich. 314; State v. Robinson, 3 Tex. App. 256; State v. Abbott, 8 W. Va. 741; Haynes v. Comm., 28 Grat. (Va.) 942, 946.

• EDWARD L. BARTLETT, solicitor-general, for the territory.

All the details complained of by appellants were brought out by them on cross-examination, bringing this case exactly within the rules laid down in regard to this class of testimony in the cases cited by their counsel. Oleson v. State, 11 Neb. 276; Reddick v. State, 34 S. W. Rep. 274, and citations.

The objection of appellants, that it was error to permit the policeman, Romero, to testify that the prosecutrix had identified the defendants at the jail as the men who assaulted her, might be well taken, under the decision in the Reddick case, supra, had the testimony been objected to at the time. There was no objection by defendants, and the error, if any, can not be considered. Comp. Laws 1897, sec. 3145.

The statements by the prosecutrix to the wife of Segura and Romero were admissible to corroborate the testimony of the prosecutrix, as shown by the authorities cited by appellants; and if admissible for any reason, they were not to be excluded on account of a wrong ground being given. 11 Am. and Eng. Ency. of Law 266; Thorp on Charging Jury, 165.

The character of evidence objected to by appellants and instructions based thereon have been approved by this court. Territory v. Eddie, 6 N. M. 564.

MILLS, C. J.—The appellants were jointly indicted, tried and convicted of the crime of rape alleged to have been committed upon the person of Teodora Martines de Maestas. The prosecutrix testified that at half past nine o'clock in the evening of April 20, 1897, in a thickly populated part of Las Vegas, with neighbors living in close proximity to her residence, she was called to the door of her house, dragged out and forcibly ravished by the appellants, each one of whom she claimed accomplished his purpose. Other than the prosecutrix, there were no witnesses to the alleged violation of the person of the prosecutrix.

The prosecutrix testified that immediately after the alleged rape she went to the residence of a friend living just across the street, and told the woman of the house of the occurrence.

A witness for the territory, Ramon Romero, a policeman, over the strenuous objection of the appellants, was permitted to testify as to statements made by the prosecutrix and conversations had with her covering the particulars of the alleged assault an hour or so after it was claimed by her to have been committed. In making complaint of the assault the prosecutrix never made mention of the names of her assailants, although on the trial she claimed she knew and recognized them. The neighbor to whom she made complaint was a close friend of the prosecutrix. Other neighbors came in and to no one of them did she tell the names of her alleged assailants. Her reason for not telling who they were was that she did not want to disclose their identity at that time. Some time afterwards, and subsequent to the arrest of the defendants on a charge of disturbing the peace, a policeman was sent for to whom the prosecutrix also told her story and the names of two of her alleged assailants. She had known the appellants for several years. On the day following the assault she identified the appellants as the guilty parties. This was done at the county jail.

The only attempt at corroboration of the story of the prosecutrix was her testimony as to the clothes found upon the appellants when they were arrested.

The appellants denied the charge. Their defense was an alibi and evidence showing their whereabouts at the time of the alleged rape was not broken by any testimony on the part of the territory and was uncontradicted except by that of the prosecutrix.

The appellants contend as follows:

1. That the trial court erred in permitting the prosecutrix to testify as to the details and particulars of her conversation and to her acts at the house of her neighbor, Cruz Segura, subsequent to the commission of the rape.

2. That the court erred in permitting the witness, Ramon Romero, to testify as to the details of his conversation with the prosecutrix at the time she made complaint to him as an officer.

3. That the court erred in permitting the witness, Ramon Romero, to testify that the prosecutrix had identified the appellants at the jail as being the men who had assaulted her.

4. The statements and declarations made by the prosecutrix to the wife of Cruz Segura and Policeman Romero were not a part of the *res gestae* and their admission is assigned as error.

5. To exclude the testimony of defendants' witnesses who were asked to testify as to statements made by the prosecutrix contrary to those given at the trial is assigned as error.

6. The prosecutrix and the other witnesses for the territory were permitted to testify as to statements made by the prosecutrix subsequent to the alleged assault. The witnesses for the defense were denied the right to testify as to these same statements and others made by the prosecutrix. This also is assigned as error.

Other assignments are made which it is unnecessary to consider.

As to the first assignment it is contended by the territory that the prosecutrix only testified as to facts and circumstances connected with the assault—other than a mere complaint of the assault—upon cross-examination.

The record discloses the fact that upon direct examination the prosecutrix did go into details of her acts and conversations with Policeman Romero, and the other witnesses in chief for the territory were allowed, over the objection and exception of the appellants, to go into details of all statements made by the prosecutrix subsequent to the alleged assault.

CRIMINAL law:
rape: evidence:
admissibility.

Under the great weight of authority this was reversible error and the court so holds. The true rule is to admit nothing except the fact of the complaint. Roscoe's Crim. Ev. [8 Ed.], p. 45.

The particulars of the complaint are inadmissible on behalf of the prosecution. *Baccio v. People*, 41 N. Y. 265; *People v. Mayes*, 66 Cal. 597; *Johnson v. State*, 21 Tex. App. 368.

The prosecutrix may be asked whether she made complaint of the injury, when and to whom, and the person to whom she complained may be called to prove the fact; but the particular facts stated by the prosecutrix are not admissible in evidence, except when elicited on cross-examination, or by way of confirming her testimony after it has been impeached. Indeed, the complaint constitutes no part of the *res gestae*. *People v. Hulse*, 3 Hill 316; *People v. Magee*, 1 Denio 19; *Steven v. State*, 11 Ga. 225; *Wharton on Crim. Law*, 1150; *Oleson v. State*, 38 Am. Rep. 366, cases cited in note; *Kirby v. Territory*, 28 Pac. Rep. 1134; *People v. Hicks*, 56 N. W. Rep. 1102.

In the case of *Riddick v. State*, 34 S. W. Rep. 276, the court says:

"In prosecutions for rape or for assault with intent to commit rape, proof of the fact that the prosecutrix made complaint soon after the commission of the alleged crime is admissible and, indeed, is generally required; but the particulars

of the complaint can not be admitted in evidence as to the truth of her statement. The particulars stated, as to the violence used, or the person who committed the violence can not be received. The evidence should be confined to the bare proof of the fact that the complaint was made, and that an individual was charged without mentioning his name." Citing *Reg. v. Walker*, 2 Moody and K. 212. This precise question came up in *Pefferling v. State*, 40 Tex. 487, and the supreme court reversed the judgment upon the ground that the brother of the prosecutrix was permitted to swear to a detailed statement made by the prosecutrix (his sister). Judge Moore, speaking for the court, says: "it is, we think, well established by reason, as well as the great weight of authority, that proof of the particulars of the complaint and the detailed statement of the alleged facts and circumstances connected with it, as was permitted in this case in the court below, can not be admitted as original evidence, to prove the truth of the statement testified to by the injured party, or to establish the charge made against the prisoner."

We deem these citations amply sufficient to support the proposition that, as original testimony, nothing but the complaint and the parties to whom related as stated in the *Indiana* case (*Thompson v. State*, 38 Ind. 40), are admissible."

It appears from the direct testimony of the prosecutrix (*Trans.*, pp. 7 and 8), that she went to the house of Cruz Segura and "his wife met me at the door and asked me what was the matter with me and I said "you are very unjust neighbors, three masked men have assaulted me." His wife asked me what did they do to you and I said to her "they did to me what they wanted to do, all they pleased." Then I went inside the house and requested the man in there to go to my uncle Timoteo Romero, and notify him of the occurrence and also notify the policeman." And again (*Trans.* p. 9), in answer to the question. "Now you may state what you stated to them then?" The prosecutrix, over the objection of the appellants was permitted to respond, "I went with them to my uncle's house and then I brought them to the house and showed them

the condition it left the room in from which I had been taken out * * * and then they asked me if I could give any clue to who the parties were who had assaulted me, and that they would arrest them, and I told them that if I could see the parties I would recognize them, but at that time I only knew Pablo Lucero and Manuel Maldonado, and I could give them a clue telling them the clothes they had on, and I gave the policeman a description of the clothes and the policeman went to make the arrest."

All of this and much more of the same kind of testimony was permitted to go to the jury in the direct examination of the prosecutrix over the objection of the defendants below, and under the great weight of authority, we believe such action on the part of the trial court to have been reversible error.

The same reasoning and ruling applies in the assignment relative to the permitting of the witness, Romero, to testify as to the identity of the defendants at the jail by the prosecutrix as well as her own testimony in regard thereto.

This is held to be error in *State v. Reddick*, *supra*, where the court says:

"The conduct of the sheriff, the fact that the prosecutrix and the boy in the jail identified the defendant as the man who committed the crime, were not a statement of complaint of the prosecutrix soon after the transaction which had already been made; and yet had been the first time that she had recognized the defendant, it would have been clearly inadmissible. All that could have been proven was that she complained of the outrage."

In the light of the almost universal authority condemning the admission of testimony such as was permitted in this case, the case will be reversed and remanded for a new trial.

McFie, Parker and Crumpacker, JJ., concur; Leland, J., dissenting.

[No. 780. August 30, 1899.]

FIRST NATIONAL BANK OF ALBUQUERQUE, NEW MEXICO, and AGNES C. ROBINS, Appellants, v. WILLIAM W. McCLELLAN, EUNICE McCLELLAN, his wife, and NAOMI DUNCOMBE, Appellees.

SYLLABUS BY THE COURT.

REFERENCE — FINDINGS OF MASTER — PRESUMPTION — ADVANCEMENT BY WIFE TO HUSBAND WITHOUT PROMISE TO REPAY—SUBSEQUENT CONVEYANCE TO WIFE—CONSIDERATION—BURDEN OF PROOF—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESSES—ERROR—RENEWAL NOTE—FRAUDULENT TRANSFER OF PROPERTY.—1. An order of reference to a master directing him to take the proofs and report the same to the court, with his conclusions thereon, and the master acting thereunder makes findings of fact and conclusions of law, and no objection is made either to the order or the action of the master thereunder in assuming to make such findings, it will be presumed that the master acted within the scope of his authority and with the consent of the parties.

2. Where a wife advances money to her husband without any promise to repay the same or under such circumstances as not to create the relation of debtor and creditor *at the time*, such advancement is no consideration for a subsequent conveyance to her.

Where a husband makes a gift to his wife, as against his creditors at at the time, it devolves upon the wife to show that his remaining estate was ample to satisfy their demands.

3. Where a husband conveys all of his estate to his wife's mother who thereupon shortly conveys the same to the wife, the burden of proof in a contest between her and her husband's creditors, is upon the wife to show that the conveyance was for a valuable and adequate consideration without fraudulent intent on the part of the husband or participation therein by herself and mother.
4. Where the cause is referred to a master with the consent of the parties to find the facts and draw conclusions therefrom, and the master passes upon the weight of conflicting evidence and the credibility of witnesses, and where there is evidence to support his findings and they can not be said to be manifestly wrong, his findings of fact are to be treated as unassailable, and it is error in the court below to overrule them.

5. The holder of a renewal note is entitled to the same remedies against a fraudulent transfer of property as if he were proceeding upon the original note.

Appeal, from a decree for defendants, from the Second Judicial District Court, Bernalillo County. Reversed and remanded.

The facts are stated in the opinion of the court.

A. B. McMILLEN and JOHNSTON & FINICAL for appellants.

So far as the master's findings of facts depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the findings, it is entitled to all the consideration of the special verdict of a jury. *Davis v. Schwartz*, 155 U. S. 631; *Kimberly v. Arms*, 129 Id. 524; *Tighman v. Proctor*, 125 Id. 136; *Callaghan v. Meyers*, 128 Id. 666; *Medsker v. Bonebreak*, 108 Id. 72; *De Cordova v. Korte*, 7 N. M. 678, 41 Pac. Rep. 526; *Field v. Romero*, Id. 630, 41 Pac. Rep. 517; *Gentile v. Kennedy*, 8 N. M. 348; *Givens v. Veeder*, 50 Pac. Rep. (N. M.) 316.

There are certain rules established by law for determining the validity of transfers under the statute, and if these rules are transgressed, such transfers are void, without regard to the opinions of the parties to the transfer. *Bump. on Fraud. Conv.* [4 Ed.], secs. 27, 242, 243, 244; *Potter v. McDowell*, 31 Mo. 62; *Grover v. Wakeman*, 11 Wend. 187.

Where a debtor conveys land to his wife and a pre-existing creditor brings action to impeach the conveyance for fraud, the burden is on the wife to show that a valuable consideration actually passed from her to her husband. *Seitz v. Mitchell*, 94 U. S. 580; *Horton v. Dewey*, 53 Wis. 413; *Hoffman v. Nolte*, 127 Mo.; *Peeler v. Peeler*, 109 N. C. 631, 14 S. E. Rep. 59; *Gable v. Cigar Co.*, 140 Ind. 563, 38 N. E. Rep. 474; *Stevens v. Carson*, 38 Neb. 550; *Thompson v. Loenig*, 13 Id. 386; *Seasongood v. Ware*, 104 Ala. 212, 16 So. Rep. 51; *Kelly v. Connell*, 110 Ala. 543, 18 So. Rep. 9; *Glass v. Zutaveru*, 43 Neb. 334; *Grant v. Sutton*, 90 Va. 772,

19 S. E. Rep. 784; Wood v. Harrison, 41 W. Va. 376, 23 S. E. Rep. 560; Claffin v. Ambrose, 37 Fla. 78, 19 So. Rep. 628; Hutchinson v. Boltz, 35 W. Va. 754, 14 S. E. Rep. 267; Bump. on Fraud. Conv. [4 Ed.], sec. 288. See, also, as to donee and grantee in deed: Bump. on Fraud. Conv. [4 Ed.] 249, 66; Callan v. Statham, 23 How. 447; Gibbs v. Thompson, 7 Humph. 179; King v. Moon, 42 Mo. 551; Humphries v. Wilson, 2 Del. Ch. 331.

A renewal note is not payment of the indebtedness represented thereby. Danl. Neg. Insts., secs. 1266a, 1266c; Bump. on Fraud. Conv. [4 Ed.], sec. 296.

A party loses no right by change of securities, and the holder of a new note in exchange for an old one may attack a conveyance which is fraudulent as to the old one. Wait on Fraud. Conv. [3 Ed.], sec. 89; Thompson v. Hester, 55 Miss. 656; Gordon v. Baker, 25 Ia. 34; Lowry v. Fisher, 2 Bush. (Ky.) 70; Trezevant v. Terrell, 96 Tenn. 530, 33 S. W. Rep. 109; Miller v. Hilton, 88 Me. 429, 34 Atl. Rep. 266.

A transfer of all the property of a debtor, as in this case, is a badge of fraud. Bump. on Fraud. Conv. [4 Ed.], sec. 47; Wait on Fraud. Conv. [3 Ed.], sec. 231. See, also, as to what constitutes fraud, Bump. on Fraud. Conv., supra, secs. 50, 62, 63, 64; Wait on Fraud. Conv., supra, secs. 229, 231a, 235, 239; McCulloch v. Doak, 68 N. C. 267.

WARREN, FERGUSON & GILLET for appellees.

The findings of the master were not supported by the evidence and the court below, upon the showing made by complainants, properly sustained the exceptions to the master's report. Pieroal v. Neill, 63 Pa. St. 420; Story v. Livingston, 13 Pet. 359; Newcomb v. White, 5 N. M. 437, 442; Hyde v. Booraem, 16 Pet. 169; Bond v. Brown, 12 How. 254.

McClellan's transfer to his wife was made long before the commencement of suit of either of complainants, and they extended him credit after he had so transferred his property and the deed was of record. Moreover, the wife's money paid for the property, and having paid the consideration the property belonged to her. Desmond v. Meyers, 71 N. W.

Rep. 877; Strong v. Gordon, Id. 866; Trust Co. v. Linn, 72 Id. 496; Bank v. Weston, 542; Coal Co. v. Burnham, Id. 487; Sprague v. Benson, 20 Id. 731. See, also, Wilkinson v. Buster, 22 So. Rep. 34; 3 Wait's Act. & Def. 469; Maguiac v. Thompson, 7 Pet. 348; Splawn v. Martin, 17 Ark. 146; Eyre v. Potter, 15 How. 393; Jansen v. Lewis, 72 N. W. Rep. 861; Hill v. Meinhard, 21 So. Rep. 805; Bank v. Rohrer, 39 S. W. Rep. 1047; Brown v. Bradford, 72 N. W. Rep. 648.

Under the allegations of the bill, complainants were not in a position to attack the conveyance from McClellan to Mrs. Duncombe. Hussey v. Castle, 41 Cal. 339, 239; Grant v. Whitmore, 64 Me. 239.

PARKER, J.—This is a creditor's bill filed by appellants against appellees to subject certain real estate in the city of Albuquerque to the payment of certain judgments obtained by appellants against appellee, William W. McClellan. The cause was referred to one of the standing masters in chancery with directions to take the proof and "report the same to the court, with his conclusions thereon." The master, after taking the proof filed his report in which he makes findings of fact and draws conclusions of law therefrom, and recommends a decree in accordance with the prayer of the bill. Appellees filed numerous exceptions to both clauses of findings which were sustained by the court and the bill dismissed.

1. It will be observed that the reference is not in terms so broad as usually employed, it simply calling for a report of the proofs together with the master's opinion thereon, nor does it appear from the order that the reference was by consent. But the master having assumed under the order to find facts and draw conclusions of law therefrom, and no objection being made either to the order or the action of the master thereunder, it is to be presumed by this court that he acted within the scope of his authority and with the consent of the parties. Field v. Romero, 7 N. M. 630; De Cordova v. Korte, Id. 678; Express Co. v. Walker, 54 Pac. Rep. (N. M.) 9.

REFERENCE: find-
ings of master:
presumption.

2. The master made among others, the following findings: Ninth: That on December 15, 1892, the defendant, W. W. McClellan, transferred to his wife, the defendant, Eunice McClellan, through O. N. Marron, without consideration, lots 1 to 7, inclusive in block "K." Tenth: That defendant W. W. McClellan, by deed dated February 4, 1896, acknowledged February 29, 1896, filed for record March 2, 1896, and recorded March 6, 1896, conveyed lots 17, 18, 19 and 20, block D. for a consideration named in the deed of \$2,500 to defendant, Naomi Duncombe, his wife's mother. Eleventh: The testimony of the defendants, W. W. McClellan and Naomi Duncombe, relative to the time of the payment of the said consideration of \$2,500 is so contradictory; the method of transmitting the money is so unusual; the fact that neither of the defendants produce any letters or memoranda relative to the transaction; the secrecy observed by the defendant W. W. McClellan, thereto; the acts of ownership exercised by the defendant W. W. McClellan, after the date of said deed; the fact that the said property was conveyed by said defendant, Naomi Duncombe, to said defendant, Eunice McClellan, by deed dated May 2, 1896, which deed was kept concealed and unrecorded until the hearing in this cause; and that said transaction inaugurated immediately after defendant W. W. McClellan, had been served with summons in said suit of complaint, Agnes C. Robins, are so many suspicious circumstances that the master finds that if there was not an actual conspiracy on the part of defendants, W. W. McClellan and Eunice McClellan and Naomi Duncombe to defraud the creditors of said defendant W. W. McClellan, there was in contemplation of law such fraud as should vitiate the transaction and the master therefore finds that the above transfers are so tainted with legal fraud that they can not be regarded as valid as against the complaining creditors. Thirteenth: That the transfer referred to in finding number 9 was a gift; that although the money belonging to the separate estate of the defendant, Eunice McClellan, might have

ADVANCEMENT by wife to husband without promise to repay: subsequent conveyance to wife: consideration.

been used to purchase the same, there is nothing to show that W. W. McClellan was on that account morally or legally bound to convey the said property to the said Eunice McClellan; moreover, considering that the property had remained in his name for over a year, during which time it had formed a basis of credit for the indebtedness owing to complainants, his said transfer was a legal fraud upon his creditors, and hence must be regarded as invalid against the complaining creditors.

It will thus be seen that the master found that the transfer through Marron was a gift and void as to appellant. In this he is overruled by the court, and we think improperly. The testimony shows that the wife, at the time of the purchase, was in ill health and not expected to live; that she furnished the money out of her separate estate with which the purchase of the first two lots was made; that she desired the title taken in the husband's name; it fails to show any promise, express or implied, to repay the money, or any understanding between them that the property was to be conveyed to her, or that the relation of debtor and creditor was thereby created; that the husband afterwards bought lots adjoining those first purchased, mortgaged them for the purchase price, which mortgage was paid off by the mother-in-law; it fails to show any understanding that this payment by the wife's mother was to be a consideration for the transfer to the wife; that the husband then conveyed all this property to the wife, through Marron, without any consideration at the time. We think this transfer to the wife was voluntary in that it was without valuable consideration. Where a wife advances money to her husband, without any promise to repay, or under such circumstances as not to create the relation of debtor and creditor at the time, such advancement is no consideration for a subsequent conveyance to her. *Bump, Fraud. Convey.* [4 Ed.], sec. 286. *Hanson v. Manley*, 33 N. W. (Iowa) 357; *Carbiener v. Montgomery*, 66 N. W. (Iowa) 900-902; *Bank v. Jenkins*, 3 Atl. (Md.) 302; *Jenkins v. Middleton*, 13 Atl. (Md.) 155, 156; *Frank v. Humphery*, 12 N. E. (Ill.) 720-722;

Jackson v. Beach, 9 Atl. Rep. (N. J.) 380; Hermess v. Scruggs, 94 U. S. 22-28.

This transfer then must be held to be voluntary and consequently void as to appellants, unless the husband retained ample property to satisfy the demands of his creditors. It does appear that he still retained property afterwards conveyed to the wife through the mother-in-law, but it also appears that it was mortgaged for \$2,000, that he tried to sell it but could not, until he finally conveyed it to the mother-in-law, who was the only person he could find to buy it. It was doubtful market value and incumbered. This was not a sufficient showing. It devolved upon the wife to show that his remaining estate was ample to satisfy the demands of the husband's creditors, and this she failed to do. Bump. Fraud. Convey., secs. 249, 259; Hoffman v. Nolte, 29 S. W. (Mo.) 1006.

3. In regard to the transfer mentioned in findings ten and eleven it appears from the transcript that the deed to the mother-in-law is dated February 4, acknowledged February 29, filed for record March 2, and recorded March 6, 1896; that the husband testified that he first recorded the deed before sending it to the grantee, and before receiving the \$2,500 consideration; that the mother-in-law testified that she sent the \$2,500 about February 1, 1896, and before she received the deed; that they both testified that the \$2,500 was sent by express in currency, in a package of clothing or dry goods addressed to the wife; that on February 3, 1896, the wife received by express two packages, one six and a half pounds, and one six and three-quarters pounds, both of which were what are called "freight packages," not marked as valuable, but whence they came does not appear from express company's records; that neither of appellees can produce any letters or memoranda of the transaction; that by deed dated May 2, 1896, the mother-in-law conveyed the property to the wife, but the deed is kept concealed and unrecorded until the hearing; that it is first disclosed by the husband while on the

CONSIDERATION:
burden of proof.

stand, in explanation of the fact that he had returned the property for taxation in the name of the wife; that the deed to the mother-in-law was dated within a few days after the service of summons upon the husband in the act of appellants, Agnes C. Robins, against him on the original note; that the wife, the person most interested in the result of this proceeding, failed to take the stand and disavow knowledge of, or participation in any fraudulent intent on the part of the husband, and the mother-in-law had no knowledge of any answer being filed for her in this case, and the answer fails to contain any disclaimer by her of interest in the property, although filed long after she had parted with the title to the wife; that the \$2,500 after it was received by the husband, was not deposited in any bank, but was kept in the house of husband and wife for a time, and then put in the husband's office safe, thus never becoming available asset which might be seized by his creditors in place of the property conveyed. Upon this state of the evidence, the master found the conveyance to be fraudulent, as we think correctly. The fact that the whole of the husband's estate is conveyed to the mother-in-law, who thereupon conveys the same to the wife, being shown, the burden of proof was upon the wife to overcome the presumption of legal fraud arising therefrom, and to show that the conveyance was for valuable and adequate consideration out of her separate estate. *Seitz v. Mitchell*, 94 U. S. 580; *Hoffman v. Nolte*, 29 S. W. Rep. (Mo.) 1006; *Burt v. Timons*, 2 S. E. Rep. (W. Va.) 780; *Livey v. Winston*, 4 S. E. (W. Va.) 451; *Herzog v. Silkman*, 97 Pa. St. 509; *Bump*, *Fraud. Convey.* [4 Ed.], sec. 288. And she must go even further and show the good faith of the transfer. *Horton v. Dewey*, 10 N. W. (Wis.) 599; *Carson v. Stevens*, 58 N. W. (Neb.) 845; *Thompson v. Loeing*, 14 N. W. Rep. (Neb.) 168; *McEveny v. Rowland*, 61 N. W. Rep. (Neb.) 124; *Kaiser v. Wagner*, 12 N. W. (Iowa) 754; *Walt*, *Fraud. Convey.* 301. This showing the wife failed to make.

4. Even had we been inclined to find differently from the master as to the facts in this case, still the master passed

upon the weight to be given to conflicting evidence, heard the testimony of the husband, had an opportunity to observe his demeanor, and passed upon his credibility as well as that of the other witnesses he has the best opportunity of any one who has examined this record to arrive at a just conclusion as to the intent of the parties in making this second transfer. There was evidence to support his findings of facts, and they do not manifestly appear to be wrong. Under these circumstances, the findings of facts by the master are to be treated as unsailable, and it was error in the court below to overrule them. *Davis v. Swartz*, 155 U. S. 631; *Kimberly v. Arms*, 129 U. S. 524; *De Cordova v. Korte*, 7 N. M. 678; *Field v. Romero*, 7 N. M. 630; *Gentile v. Kennedy*, 8 N. M. 347; *Givens v. Feeder*, 50 Pac. Rep. (N. M.) 316; *Express Co. v. Walker*, 54 Pac. Rep. (N. M.) 875.

5. It is conceded that the indebtedness of the appellant, The First National Bank, was incurred after the transfer through Marron to the wife. But it appears that the original liability was incurred when the title to this property was in the husband, and the note was renewed from time to time thereafter. It was a mere change of notes from time to time, which evidences the same indebtedness and the holder of the last renewal note was entitled to the same remedies against the maker as if he still held the original note, and recovered his judgment thereon. *First Nat. Bank v. Lesser & Lewinson*, decided at this term.

For the reason assigned the decree of the lower court is reversed and the cause remanded with instructions to enter a decree in accordance with the prayer of the bill.

Mills, C. J., and McFie, J., concur; Leland and Crumpacker, JJ., not sitting.

[No. 26a. January 17, 1867.]

***ELSBERG & AMBERG, Plaintiffs in Error, v. ADMINISTRATORS OF AUGUSTIN MAURIN, Defendants in Error.**

REPLEVIN—NO PLEA FILED—FAILURE OF PLAINTIFF TO PROSECUTE.—In replevin, where the defendant files no plea, there is no issue, and a trial can not be had, though plaintiff fails to appear. The statute directing how judgment shall be entered in such cases is imperative and must be followed. Comp. Laws, secs. 6, 7, p. 244.

Error, from a judgment for defendants, to the Third Judicial District Court, Dona Ana County. Reversed and remanded.

The facts are stated in the opinion of the court.

SLOUGH, C. J.—This cause is brought from the Third judicial district court, Dona Ana county. The appellants, plaintiffs in the court below, brought an action in replevin for the recovery of a portable grist mill, valued at \$500. Maurin, the original defendant, having died, Frietze and Jennerette, his administrators, were subsequently substituted. The record shows no plea to the declaration. At the June term, 1866, of the Dona Ana court, the following action was had and entry in the record of that court made: "Elsberg & Amberg v. Daniel Frietz & Jules Jennerette, administrators of estate of Augustin Maurin.

"Replevin. And now comes the defendants, by their attorney, Theo. D. Wheaton, Esq., and the plaintiffs, though three times solemnly called at the door of the courthouse, came not, and failed to prosecute said suit; and, a jury being required to assess the value of the property and the damages herein, the following named jurors were tried, sworn, and impaneled as such jury, to wit [twelve names inserted], who.

*Omitted and received too late to be reported sooner.—REPORTER.

having heard the allegations and proofs in the cause, assessed the damages at fifteen hundred dollars, to wit, 'We, the jury in this cause, find for the defendants, and assess the damages at fifteen hundred dollars.' It is therefore considered and adjudged by the court that the said defendants have and recover of the said plaintiffs the sum of fifteen hundred dollars damages, together with their costs, taxed at ———, and that they have execution therefor." The plaintiffs thereupon sue out their writ of error, and the cause is brought to this court.

It is claimed by the appellants, in substance: First, that the court below erred in granting a trial and entering a judgment in favor of the appellees, in the absence of a plea on their part; and, second, that the verdict entered is not a legal verdict, and the judgment thereon is erroneous in both form and substance, and is therefore not a legal judgment.

The action of replevin is a statutory action in this territory. The statutes point out with great particularity the different steps necessary in the action. Sections 6 and 7 of the chapter of the Code of Civil Procedure and Practice on the subject of "Replevin," to be found on page 244 of the Compiled Laws of New Mexico, are as follows:

"Sec. 6. The defendant may plead that he is not guilty of the premises charged against him, and this plea will put in issue, not only the rightful ownership of the property mentioned in the declaration, but also the wrongful taking and detention thereof.

"Sec. 7. In case the plaintiff fails to prosecute his suit with effect, and without delay, judgment shall be given for the defendant, and shall be entered against the plaintiff and his sureties for the value of the property taken, and double damages for the use of the same from the time of delivery, and it shall be in the option of the defendant to take back such property or the assessed value thereof."

The court is not disposed to argue so plain a proposition as that contained in the idea that there can not be a trial with-

REPLEVIN: no
plea filed; failure
of plaintiff to
prosecute.

out an issue, or that there can not be an issue without pleadings on the part of parties litigant. Such is the plain rule of law, and the universal practice of all the courts of all enlightened nations from time immemorial. The text-books of the profession of law contain no other principle. Our statutes, in section 6, referred to, in substance, only reiterate the principle. A plea was therefore necessary before a trial could be held in the court below and judgment rendered in this cause. Section 7, of the statutes, referred to, provides for the mode of disposal by the courts of cases in replevin where there is a failure to prosecute on the part of plaintiff. The language of this section directs, imperatively, the manner in which judgments in such cases shall be entered. In this case there appears to be an almost entire failure to comply with the requirements of the law in this respect. It is apparent that the judgment is far short of fulfilling the requirements of this law, and is therefore erroneous. For either of the errors, fatal as both are, it is the duty of this court to reverse the judgment of the court below in this cause, and to remand the same for its further action, which is now unanimously done.

[No. 396. January 23, 1889.]

***IN RE PETITION OF JAMES BRYDON FOR WRIT OF HABEAS CORPUS.**

- **HABEAS CORPUS—RETURN—RELEASE FROM IMPRISONMENT.**—Where, on *habeas corpus*, there was nothing to contradict the return of the sheriff, showing that, at the date of the petition, the petitioner was not restrained of his liberty, an order releasing him from unlawful imprisonment could not be made.

Petition for Writ of Habeas Corpus Denied.

The facts are stated in the opinion of the court.

*Omitted and received too late to be reported sooner.—REPORTER.

EDWARD L. BARTLETT for petitioner.

LONG, C. J.—On the seventeenth day of January, 1889, James Brydon filed in the supreme court his petition for writ of habeas corpus; averring therein that at that date he was unlawfully restrained of his liberty by Francisco Chavez, sheriff of Santa Fe county. It is further averred that the cause of such restraint is a commitment issued by a justice of the peace of said county; and it appears by other averments that an affidavit was filed before such justice, upon which a warrant issued, and the petitioner was arrested, on the charge attempted to be made in said affidavit. The petitioner predicates his right to a release from the alleged illegal imprisonment on the ground that the affidavit on which the arrest was made, and the proceeding had before the justice of the peace, does not charge any offense under the law, and that, therefore, the warrant which issued was void, and the proceeding also void. The assistant attorney-general appeared in this court on behalf of the territory, and a stipulation appears in the record, between him and the petitioner's counsel, in relation to the evidence which may be considered. The writ, as prayed for, was ordered by this court, and returned on the twenty-first day of January. The purpose, in part, for which the writ was ordered, was to ascertain whether the petitioner was in fact restrained of his liberty at all, as alleged in the petition, at the commencement of the proceedings. The return of the sheriff is as follows: "I, Francisco Chavez, sheriff, do hereby certify, that James Brydon has been under the custody of the sheriff since the 14th day of January, A. D. 1889, and up to this time he is still under custody of said sheriff, Santa Fe N. M. Jany. 21st, 1889, he is under actual custody having surrendered this morning." The order for the writ was made the seventeenth, and the same seems to have been issued the nineteenth of January. There is some ambiguity about the sheriff's return, but the only reasonable interpretation of it is that there was no actual custody of the petitioner by the sheriff until the twenty-first day of January. If, prior to that date,

he was confined in the county jail as the mittimus contemplates, or was in the actual custody of the sheriff, there would be no necessity for a surrender on the twenty-first. As we construe the return, it shows the petitioner was at large, within the sheriff's reach, up to the twenty-first; that on that day, for the first time, the sheriff took him into actual custody. The return is not a compliance with section 2016. The most impressive point in the record is the number of important things that are waived. With an affidavit on file which most lawyers would have moved to quash, the defendant waived examination. With a commitment in his hand, the sheriff seems to have waived the command thereof to securely confine the petitioner in the common jail, possibly for the reason that he deemed the whole proceeding void. The issuing of the writ of habeas corpus is waived, and the return thereto is waived. To invoke the action of this court, there must be a substantial case, and there can not be with the petitioner at large, in the enjoyment of his liberty, at the date when the petition was filed. As the sheriff's return shows the petitioner did not surrender himself to the sheriff until January 21st, and as there is nothing to contradict this return, we can not find that imprisonment on that date proves imprisonment on the seventeenth day of January, and do find and adjudge that the petitioner was not, on the seventeenth day of January, restrained at all of his liberty, and therefore can not make any order releasing him from unlawful imprisonment. Costs are adjudged against petitioner. In this opinion the associate justices all concur.

[No. 523. August 24, 1892.]

*FELIPE SILVA, Appellant, v. TERRITORY OF NEW MEXICO, Appellee.

CRIMINAL LAW—APPEAL—RECORD.—On appeal in a criminal case, where the record does not set out the motion for new trial, or the grounds on which it is based, and there is no bill of exceptions presenting the evidence, and it does not appear from the record that any exceptions were taken to the rulings of the trial court, nothing is presented for review.

Appeal, from a judgment of conviction, from the Fifth Judicial District Court, Lincoln County. Affirmed.

The facts are stated in the opinion of the court.

EDWARD L. BARTLETT, solicitor-general, for the territory.

PER CURIAM.—The record in this case shows a trial by jury, and a verdict against the defendant of a fine of five dollars. There was a motion made for a new trial, which was argued and overruled by the court. The record does not, however, set out the motion or the grounds on which it was made. There is no bill of exceptions presenting the evidence, nor does the record show that any exceptions were taken to the rulings of the court. The record does show that an appeal was properly taken to this court, but from what does not appear. There being nothing properly brought before this court for its consideration, the judgment of the court below will be affirmed.

*Omitted and received too late to be reported sooner.—REPORTER.

INDEX.

ACTIONS.

1. **ON FOREIGN JUDGMENTS.**—Held: That by section 2 of the act of 1891, it was the intention of the legislature to give holders of foreign judgments, existing at the time of the passage of the act, one year from that date within which to commence their actions, and if not brought within that period, then such actions to be forever barred; and the fact that defendant came into this territory for the first time three years after the time within which the right of action became barred, did not remove the bar, nor interrupt the continuous running of the statute. *Stern & Krauss, v. Bates*, 286.
2. **STATUTORY CONSTRUCTION.**—Held: That section 1868, Laws 1884, providing that if, after a cause of action accrues, a defendant moves out of this territory, the time during which he shall be a non-resident of the territory shall not be included in computing any of the periods of limitation therein provided, applies to domestic judgments only.—Id.
3. **AUXILIARY PROCEEDING.**—An attachment is auxiliary where a personal judgment is sought, but it is an original attachment where a judgment in rem only is sought.—*Fruit Exchange v. Stamm*, 361.
4. **MAY INTERVENE AFTER APPEAL, WHEN.**—A taxpayer may be granted leave to intervene in an appeal taken under section 289 of the Compiled Laws of New Mexico, 1897, by a claimant feeling aggrieved by the action of the city council.—*Miller v. City of Socorro*, 416.
5. **LIMITATIONS—CITY WARRANTS.**—It is not error for the court to enter judgment against plaintiff, a plea of the statute of limitations having been interposed, on a petition to fund city warrants, where there is nothing in the record in explanation of the long delay of ten years or more, extending from the date of the city's indorsement upon the warrants of "not paid for want of funds" to the date of bringing suit, in instituting the action.—Id.
6. **ABATEMENT—SECURITY FOR COSTS.**—Where a plaintiff makes the oath required by section 2893 of the Compiled Laws of New Mexico, 1897, after suit instituted and prior to the time within which he is ruled to give security for costs, it is error for the court to abate the cause for failure to give such security, the oath, standing in the stead of the cost bond, being sufficient answer to the rule.—*Bearup v. Coffey*, 500.

7. **TROVER—CUTTING TIMBER FROM PUBLIC LAND—PARTIES.**—Where the United States sues in trover, for damages for the cutting and converting to the defendants' use timber cut from the public lands, defendants are sued individually as well as under the firm name of Gumm Bros., it is not error for the court to overrule a demurrer to a plea in abatement denying existence of said firm, and alleging existence of firm under another name. In such case a partner may be sued individually without regard to the partnership.—*United States v. Gumm Bros.*, 611.

See, also, **MANDAMUS; HUSBAND AND WIFE**, 3; **COMMUNITY PROPERTY**, 2.

ADULTERY OF WIFE. See **HUSBAND AND WIFE**, 2.

ADVERSE POSSESSION.

1. **LIMITATIONS—COMMON SOURCE OF TITLE.**—Where one holds under color of title for statutory period the fact that the grantors in the deed under which he entered derived their title from a common ancestor with the plaintiff will not stop him from setting up defense of adverse possession as against all demandants not under disability.—*Neher v. Armijo*, 325.
2. **LIMITATIONS—LEGAL DISABILITY.**—The statute of limitations creating title by adverse possession will not run against one in whose favor a right of action accrued while under a disability and who commenced his action within the statutory periods after the removal of the disability.—*Id.*

AFFIDAVITS. See **GARNISHMENT**, 5, 6; **APPELLATE PRACTICE**, 5.

1. **JUDGMENTS—COLLATERAL ATTACK—GARNISHMENT.**—On writ of error in a garnishment proceeding, where the original judgment remains unappealed from for more than one year from the date of its original entry, errors assigned in respect to such judgment are not tenable, and the judgment remaining undisposed of for that time can not now be collaterally attacked.—*Western Homestead & Irr. Co. v. First Natl. Bank*, 1.
2. **SUMMONS—SUFFICIENCY.**—In such proceeding, failure to serve the garnishee with a summons in the form prescribed by the clerks of the district courts, is not ground for reversal; it is sufficient if the service be in substantial compliance with the requirements of the statute. (*Fitzgerald v. Fitzgerald*, 137 U. S. 98.)—*Id.*
3. **CERTIORARI—JURISDICTION.**—Held: Where, as here, it is clear that the district court had jurisdiction to make the order sought to be vacated, this court will not consider the question whether or not the writ of certiorari, not being in aid of appellate jurisdiction, can legally issue to that court. *SMITH*, C. J., dissenting.—*In re Lewisohn*, 101.
4. **EQUITY—SUIT ON OFFICIAL BOND.**—Under section 5, Laws 1891, page 123, an appeal does not lie from a suit at law upon an official bond, and the mere filing of an intervening petition in such action did not convert it into an equitable action; it was only a supplementary proceeding in the original suit.—*Bank v. Brooks*, 9 N. M. 113, ante; *United States v. Lesnet*, 271.

5. **BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL.**—Where there is no motion for new trial in the bill of exceptions, errors assigned, relating to things done on the trial, are not reviewable on appeal.—*Padilla v. Territory*, 8 N. M. 562; *Territory v. Chavez*, 282.
6. **WRIT OF ERROR—ABSENCE OF BILL OF EXCEPTIONS—MOTION TO DISMISS WRIT—SUFFICIENCY.**—It is no ground for the dismissal of a writ of error, that, the assignments of error being based upon alleged errors occurring during the trial, and none upon the record proper, there is no bill of exceptions upon which they can be based. In *Rogers v. Richards*, 8 N. M. 658, and in *Insurance Co. v. Walker*, —, decided at this term, this court, in effect, held the absence of a motion for new trial to be the absence of a bill of exceptions, but in neither case rules that the writ of error should be dismissed.—*Denver and R. G. Ry. Co. v. United States*, 309.
7. **BILL OF EXCEPTIONS—SUFFICIENCY.**—Where a bill of exceptions recited that it contained certain things, including “the notes of the testimony of witness, as taken down by counsel,” at the trial, though it did not contain all the evidence introduced on the trial; and the certificate of the trial judge recited that the bill was “signed, settled and sealed as a bill of exceptions, and made part of the record in the cause.”—Held: That it was sufficient.—*Id.*
8. **WRIT OF ERROR—AMENDMENTS.**—Under the code, it is within the power of this court to permit an amendment of the writ of error by striking out the parties defendant in error.—*Neher v. Armijo*, 325.
9. **CRIMINAL LAW—TRANSCRIPT—PAYMENT OF FEES.**—On appeal in a criminal case, where the appeal operates as a stay of proceedings, either by virtue of the statute as in murder cases or by order of the district court, it is the duty of the clerk of that court to send up the transcript whether appellant pay his fees therefor or not.—*Territory v. Archibeque*, 341.
10. **REASON FOR RULING.**—The assignment of a wrong reason for an act by the trial court is not reversible error if the act done was in law right.—*Lockhart v. Wills*, 344.
11. **JUDGMENT FOR RIGHT PARTY.**—When the plaintiff's case is inherent and fatally defective and is incurable, the defendant is entitled to have the judgment affirmed, notwithstanding error of the trial court.—*Id.*
12. **NO EXCEPTIONS.**—This court will not review alleged errors, where exceptions were not taken out at the time and preserved.—*Fruit Exchange v. Stamm*, 361.
13. **BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL.**—Alleged errors occurring at the trial in criminal cases must be called to the attention of this court by motion for new trial, exception to the overruling of the motion must be saved and the motion and exception made a part of the record by bill of exceptions before this court will consider them.—*Territory v. Archibeque*, 403.
14. **IN CRIMINAL CASES—CIVIL CODE.**—The code of civil procedure does not control the requirements as to appeals in criminal cases.—*Id.*

15. **COSTS—PRINTING TRANSCRIPT.**—Costs for printing transcript of record, on appeal to this court, are improperly taxed as costs when the amount in controversy does not exceed \$1,000, such printing being purely voluntary and an unnecessary expense.—*Givens v. Veeder*, 405.
16. **MOTION FOR NEW TRIAL—REVIEW.**—Where a motion for a new trial was not made within five days, as provided in section 2685, subsection 133, Compiled Laws of 1897, errors alleged to have been committed by the court below will not be reviewed.—*Schofield v. Slaughter*, 422.
17. **ATTACHMENT—DISMISSAL OF PRINCIPAL ACTION.**—After judgment is entered for the defendant on the trial of the issues raised on the traverse of an affidavit for attachment, no appeal can be taken from such judgment when the plaintiff afterwards voluntarily dismisses the main case to which the writ of attachment was auxiliary.—*Schofield v. American Valley Co.*, 485.
18. **MORTGAGES—WHEN APPEAL WILL LIE.**—A decree under a bill for the sale of mortgaged property ordering payment of a specified sum of money to plaintiffs, that a master or trustee sell the premises, and permitting the case to pend in the court awaiting the master's report, is a final decree which may be appealed from.—*Lohman v. Cox*, 503.
19. **TRANSCRIPT, WHEN DUE—AFTERWARDS SIGNED BY JUDGE.**—In appeals in criminal cases it is necessary to file in the office of the clerk of the supreme court at least ten days before the first day of the court to which such appeal is returnable, a transcript of the record and proceedings. A district judge signing and sealing a bill of exceptions at a later date than authorized by the statute, exceeds his authority, and, on motion, the bill of exceptions will be stricken from the record.—*Haynes v. United States*, 519.
20. **GENERAL ASSIGNMENT OF ERROR.**—Assignments that error was committed in admitting "illegal and improper testimony" and in "excluding the introduction of legal and proper evidence," are too general under rule XIV of the supreme court, for us to consider.—*Schofield v. Territory ex rel.*, 526.
21. **BILL OF EXCEPTIONS—NEED NOT CONTAIN RECORD MATTERS.**—In civil cases since the passage of the code of civil procedure in 1897, it is not necessary to have the instructions of the court, the decision of the judge granting or refusing them, or the motion for the new trial, incorporated in a bill of exceptions, when they are in the record this court can consider them.—*Id.*
22. **APPELLATE PRACTICE.**—The supreme court sits only to correct errors committed on the trial of a cause below and not to pass upon the specific amount of the award of the jury in determining the case.—*Id.*
23. **MOTION FOR NEW TRIAL.**—Granting or refusing a motion for a new trial rests in the sound discretion of the court, and is not alone assignable as error.—*Id.*
24. **INTERLOCUTORY JUDGMENT—MANDAMUS.**—Mandamus will not lie to compel an appeal to the district court from a merely interlocutory order of the probate court.—*Territory ex rel. v. Hubbell*, 560.

25. **TRANSCRIPT—CERTIFICATION BY DEPUTY CLERK.**—In a criminal case, that part of the purported transcript of record not certified in accordance with rule V, section 2, of this court, by the clerk of the district court in which the appeal is allowed, will, on motion, be stricken from the record.—*Territory v. Christman*, 582.
26. **SUFFICIENCY OF CERTIFICATE.**—In such a case, the certification of the record in the name of the clerk of the district court, signed in the name of the clerk by the deputy, is a sufficient certification of the record.—*Id.*
27. **REVIEWABLE MATTERS.**—Alleged errors relating to proceedings during the trial of a criminal case and to the overruling of a motion for a continuance can not be reviewed, unless called to the attention of the trial court by motion for a new trial, exceptions saved to the overruling of such motion and the motion made matter of record by bill of exceptions.—*Id.*
28. **RECORD—NO BILL—NO MOTION FOR NEW TRIAL.**—On appeal in a criminal case, where the record does not set out the motion for new trial, or the grounds on which it is based, and there is no bill of exceptions presenting the evidence, and it does not appear from the record that any exceptions were taken to the rulings of the trial court, nothing is presented for review.—*Silva v. Territory*, 650.
See, also, APPELLATE PRACTICE.

APPEARANCE. See PRACTICE, 2.

APPELLATE PRACTICE.

1. **DECREE—MASTER'S REPORT—OVERRULING CONCLUSIONS OF LAW—PRESUMPTION.**—Where the decree expressly overrules the master's conclusions of law, it must be taken, by fair implication, as an approval of his findings of fact, and, in the absence of anything in the findings of fact against the correctness of the decree, it must be sustained.—*Witt v. Cuenod*, 143.
2. **CONSOLIDATION OF SUITS—JUDICIAL DISCRETION.**—The right of the courts of this territory to order the consolidation of causes, in their discretion, is indisputable, and the exercise of such discretion is not subject to reversal, except in cases of palpable abuse.—*Lincoln Lucky, etc., Min. Co. v. Hendry*, 149.
3. **EVIDENCE—OMISSION FROM RECORD—PRESUMPTION.**—Where a claim of error is based on a question of fact, the correctness or incorrectness of which can not be discerned from the record, the correctness of the judgment of the court below will be presumed. (*Witt v. Cuenod*, 9 N. M. 143, ante.)—*Id.*
4. **FINDING OF MASTER—EVIDENCE.**—The finding of fact by the master in chancery, like the special verdict of a jury, will not be disturbed on appeal, unless the evidence is clearly insufficient to support it.—*Givens v. Veeder*, 256.
5. **AFFIDAVITS NOT PART OF RECORD PROPER—PRESUMPTION.**—Affidavits which are no part of the record proper, will not be reviewed on appeal; and in the absence of any testimony, this court will not presume that there was sufficient testimony to sustain the finding of the court below.—*United States v. Lesnet*, 271.
6. **BILL OF EXCEPTION—NO MOTION FOR NEW TRIAL.**—Where there is no motion for new trial in the bill of exceptions, errors assigned, relating to things done on the trial, are not reviewable on appeal.—*Padilla v. Territory*, 8 N. M. 562; *Territory v. Chavez*, 282.

7. **JUDGMENT FOR RIGHT PARTY.**—Where substantial justice has been accomplished between the parties in the court below, the judgment will not be reversed by this court.—*Pearce v. Strickler*, 467.
See, also, **APPEALS**.

ASSIGNMENT.

1. **OF LIFE INSURANCE POLICY.**—A life insurance for a certain sum, assigned absolutely by the insured to his creditor for the cancellation of a debt, less than half the amount of the policy, was not a "wager policy" or "speculative risk," where, at the time of the death of the insured, the assignee had paid out on the policy, including the amount originally paid thereon, with the semiannual premiums and interest, and other costs and expenses, a sum amounting to nearly the face of the policy.—*Givens v. Veeder*, 256.
2. **OF FOREIGN JUDGMENT—STATUTES—NOTICE.**—In a suit on a judgment obtained in the court of another state, alleged to have been assigned to plaintiff, the validity of which depends on the statutes of that state, which are not proved, nor the genuineness of the judgment creditor's signature shown, a recovery can not be had. The courts of this territory can not take judicial notice of the statutes of another state; they must be proved as facts in the case. Nor is the record sufficient evidence of the assignment.—*Field v. Cain*, 283.

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ATTACHMENT.

1. **JUDGMENTS—PRACTICE.**—An attachment is auxiliary where a personal judgment is sought, but it is an original attachment where a judgment in rem only is sought.—*Fruit Exchange v. Stamm*, 361.
2. **JUDGMENTS—PRACTICE—SERVICE BY PUBLICATION.**—The court has jurisdiction to render a judgment in rem, where a levy of defendant's property has been made under a valid writ of attachment, and service by publication has as required by law, notwithstanding the return of the officer was not made until after judgment was taken.—*Id.*
3. **WAIVER OF PLEA.**—Where the record, on appeal, does not show that a plea in abatement was not urged for hearing before the trial, it will be presumed to have been abandoned.—*Id.*
4. **APPEAL BEFORE FINAL JUDGMENT.**—When an affidavit in attachment is traversed and trial is had on the issues raised, an appeal can not be taken from the judgment, until final judgment is entered in the main case to which the attachment is auxiliary.—*Schofield v. American Valley Co.*, 485.
5. **DISMISSAL OF PRINCIPAL ACTION—APPEAL.**—After judgment is entered for the defendant on the trial of the issues raised on the traverse of an affidavit for attachment, no appeal can be taken from such judgment when the plaintiff afterwards voluntarily dismisses the main case to which the writ of attachment was auxiliary.—*Id.*
6. **STRIKING OUT ANSWER—WHEN REVIEWABLE.**—On trials in attachment suits, when a demurrer to a portion of the answer is sustained and a part of the answer is stricken out and the defendants except, and answer over, omitting the objectionable paragraph, they save their right to have the ruling striking out such part of the answer reviewed on final appeal of the case.—*Schofield v. Territory ex rel.*, 526.

7. **EXEMPLARY DAMAGES—TRUTH OF AFFIDAVIT—WAIVER.**—In suits brought to recover for actual damages done by the attachment of live stock, after the writ of attachment has been traversed and dissolved, where exemplary damages are not claimed, the defendant can not prove, in mitigation of the actual damages sustained, that he had probable cause to believe the truth of the statements contained in the affidavit on which the writ of attachment issued.—Id.
8. **CONDITION AND VALUE OF ATTACHED PROPERTY.**—It is no error to allow evidence to go to the jury showing the condition and value of live stock at times other than the day of their release, as injuries may have been sustained by reason of the attachment which are not immediately apparent; nor is there any error in allowing evidence to go to the jury showing what cattle were worth when located on and familiar with a range.—Id.
9. **RANGE LEVY ACT—ROUNDING UP STOCK—APPEALS.**—In order to proceed under the range levy act (Ch. 54, LL. 1889), in attaching cattle running at large on the range, it is necessary that some substantial number of cattle belonging to other owners be actually rounded up and gathered before the plaintiff can avail himself of said act.—Id.
10. **FRAUD BY FIRM—LIMIT OF PROOF.**—Where an attachment affidavit charges a fraudulent disposition of property by a firm, plaintiff is limited in his proof to that class of transfers.—*Nat. Bank v. Lesser & Lewinson*, 604.
11. **TRACING PROPERTY — PARTNERSHIP — WIVES AS PURCHASERS.**—Without tracing any property, or the proceeds thereof, from either of defendant partners to his wife, it is immaterial, in support of the attachment affidavit charging fraudulent disposition and concealment to show that defendants' wives became the purchasers of the firm property from the assignee after assignment for creditors.—Id.
12. **ASSIGNMENT—PAYMENT BY SON-IN-LAW.**—Plaintiff offered in support of its attachment affidavit evidence that the son-in-law of one defendant partner, shortly after a general assignment by the firm, paid off a mortgage on defendant's property with defendant's money,—Held: not competent evidence to support the allegation of fraudulent disposition and concealment by the firm.—Id.
13. **EVIDENCE—MONEY BY MAIL.**—Plaintiff offered to show that defendants, shortly before attachment and assignment for creditors, transmitted money through the postoffice,—Held: to be competent in support of attachment affidavit.—Id.
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BILL OF EXCEPTIONS. See APPELLATE PRACTICE, 6; APPEALS, 5, 6.

BILLS AND NOTES. See NOTES.

BOARD OF PUBLIC EDUCATION. See PUBLIC SCHOOLS.

BOND.

JUDGMENT ON WITHOUT NOTICE—PRACTICE.—Where a paper purporting to be a "bond" filed in a cause pending the hearing, conditioned to answer any judgment that might be recovered against the principal, did not appear to have been acknowledged before the court or judge, and the persons purporting to be sureties on the bond were not be-

fore the court, were not parties to the cause, nor given any notice of the proceedings against them, a judgment against such persons was unauthorized and erroneous.—*Rice v. Schofield*, 314.

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STOCK—LIEN OF PLEDGEE.—A pledgee of building and loan association stock is entitled to a lien thereon, as expenses, for payments made by him of assessments thereof, where it is admitted that the levy is legal and that there would be an infliction of fines against the stock for non-payment of the assessments, if the pledgor fails or refuses to pay the same.—*Wells, Fargo Express v. Walker*, 456.

CERTIORARI.

1. **FILING OF DECLARATION—ORDER NUNC PRO TUNC—JURISDICTION.**—On certiorari, where a nunc pro tunc order was made in each of two causes, and the order of one cause was in identical language with that of the other, and both made the same day, reciting that the declaration had been left with the clerk, and that the advance fee required by law had in fact been paid, and there was no averment in the petition in conflict with these recitals,—Held: That a paper left with the clerk for filing in a cause, whether marked "filed" or not, is a paper in the cause, and the court had jurisdiction to act in regard to the same. (Comp. Laws. sec. 1867.)—In *re Lewisohn*, 101.
2. **JURISDICTION—APPELLATE PRACTICE.**—Held: Where, as here, it is clear that the district court had jurisdiction to make the order sought to be vacated, this court will not consider the question whether or not the writ of certiorari, not being in aid of appellate jurisdiction, can legally issue to that court. *SMITH, C. J.*, dissenting.—*Id.*

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LIMITATIONS.—It is not error for the court to enter judgment against plaintiff, a plea of the statute of limitations having been interposed, on a petition to fund city warrants, where there is nothing in the record in explanation of the long delay of ten years or more, extending from the date of the city's indorsement upon the warrants of "not paid for want of funds" to the date of bringing suit, in instituting the action.—*Miller v. City of Socorro*, 416.

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COMMUNITY PROPERTY.

1. **RIGHTS OF WIFE IN—HOW FORFEITED.**—While, under the Spanish law, the wife is entitled to one-half of the acquest or community property on the death of her husband, by commission of the act of adultery she forfeits that right.—*Barnett v. Barnett*, 205.
2. **RIGHT OF SURVIVING HUSBAND TO SELL.**—Under the Spanish law, the surviving husband has the power to sell as much of the community property as may be necessary to pay the community debts: and any transfer of such property made by him, in the exercise of that power, conveys a valid title to the purchaser, and the heirs can not restrain him in his action as such survivor, unless it be shown he is prostituting his power, and committing waste, to their injury.—*Crary v. Field*, 222.

3. **HUSBAND'S FAILURE TO APPLY PROCEEDS OF SALE TO PAYMENT OF DEBTS—RIGHTS OF BONA FIDE PURCHASER.**—Under the Spanish law, the rights of a bona fide purchaser of community property are not affected by the fact that the surviving husband fails to apply the proceeds of a sale made by him alone to the payment of the community debts.—Id.
4. **SALE—PURCHASER'S TITLE—LEGAL PRESUMPTION.**—Where a husband, surviving his wife, who died in 1868, sold the community property in 1882, and in 1891 one of the children brought suit for her share of the property, and it did not appear that it was not sold for a consideration adequate to pay the community debts; nor was it pretended that there was any collusion or fraud in its disposition, or that the contract value was not paid; nor appeared that the proceeds were not properly applied; nor that the community estate had been so administered, she could not receive her share of it without damage to an innocent purchaser; nor that she could not secure redress upon the bond of the administrator,—Held: That the legal presumptions, precluding a reasonable doubt of a paramount title in the purchaser, must be applied.—Id.

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2. **CORPORATION CONTRACTS LEGAL WITHOUT SEAL.**—In such case, it is not necessary to bind a corporation, that its contracts be under seal.—Id.
3. **PARTNERSHIP—ASSUMPSIT.**—Where, on an agreement between partners, that the partnership should "stand dissolved from and after" a named date, the retiring partner to retain an interest in the accruing profits of the new firm until a certain date, when an appraisement of the firms assets would be made and a final accounting had, an action of assumpsit was brought by the new firm as such on an account against the retired partner for an alleged indebtedness previously accruing.—Held: That the action could not be maintained.—Wormser & Co. v. Lindaner, 23.

4. **STATUTES—NOTICE—ESTOPPEL.**—The statutes are a public notice of their contents, and a complainant contracting presumably with a knowledge that defendant was limited, by the statute creating it, to a two-mill levy for the discharge of its obligations, will not be heard to complain that the trustees of defendant refused to transcend the power.—*Raton Waterworks Co. v. Raton*, 70.
5. **UNDER STATUTE—MUST FOLLOW STATUTE.**—The power to make the contract in question, and to execute the proprietary grant and business portion of a quasi public nature, did not carry with it the power to depart from the mode prescribed by the statute for raising revenues with which to pay for the supply of water so contracted to be furnished.—*Id.*
6. **SPECIFIC PERFORMANCE—JURISDICTION.**—While a court of equity, in an action against a town for the specific performance of a contract for the payment of water rents, may declare the validity of the contract, it has no jurisdiction to compel the town to make a levy, the remedy in such case being by mandamus.—*Id.*
7. **BY TOWN—CONSTRUCTION.**—The contract of a town to pay more than it has the power to collect by taxation is not void, but obligates the town to exhaust its power, if necessary, to collect a tax sufficient within the statutory limitation of levy of two mills upon the entire taxable property within its jurisdiction.—*Id.*
8. **IMPLIED—PARENT AND CHILD—WAGES—SUPPORT.**—When a person in living *in loco parentis* with another, both are estopped from claiming for wages or services performed on the one hand, or for board and necessities furnished on the other, unless an express contract for compensation is proved.—*Garcia v. Candelaria*, 374.
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10. **EVIDENCE—DUTY OF COURT.**—When such evidence is inadvertently permitted to go to the jury, it is the duty of the court to withdraw such evidence.—*Id.*
11. **FRAUD — SURETY — KNOWLEDGE — ESTOPPEL.**—Where one becomes surety for an alleged existing shortage in the accounts of another, the mere fact that he has knowledge of an unexplained irregularity (and the fact of the acceptance of the security by the creditor under the peculiar circumstances of this case is such knowledge to the surety) is sufficient to put the surety upon inquiry; and if he fails to seek important information within his reach he can not, in the absence of fraud on the part of the creditor, set up as a defense facts then first learned which he ought to have known and considered before entering into the contract.—*Wells, Fargo Co.'s Express v. Walker*, 456.

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CORPORATIONS.

1. **CONTRACTS—NOT UNDER SEAL—AGENCY.**—Where the by-laws of a corporation require its contracts to be signed by two at least of its officers, and its general manager made a verbal contract with a third party in good faith, which was afterwards reduced to writing, and signed by him as such manager in the presence of all its officers, without objection,—Held: That the corporation was bound by the contract.—*Western Homestead & Irr. Co. v. First Nat. Bank*, 1.
2. **CONTRACTS—SEAL NOT NECESSARY.**—In such case, it is not necessary to bind a corporation, that its contracts be under seal.—*Id.*
3. **LEASE—MERGER—FRAUD.**—Where a majority of the stock of an electric lighting company was purchased by persons, who became directors assume control of the company and formed and become directors of a new company, under their control, the purpose of both being to furnish light; and the directors of the new company by virtue of their position in the old, obtained a lease of all the poles and wires of the latter, so that its plant and machinery could not be operated, the former retaining power to terminate the lease at any time, but binding the old company not to terminate it for eighteen months, a mortgage having been given, before the establishment of the new company on all the property of the old, which had become much depreciated in value; the president of the new company testifying that, but for the mortgage, the two companies would have consolidated,—Held: Conclusive evidence of fraudulent combination to defeat the mortgage.—*Santa Fe Elec. Co. v. Hitchcock*, 156.
4. **LEASE—MERGER—LIABILITY OF NEW COMPANY—AFTER ACQUIRED PROPERTY.**—A lease by one corporation to another of all its poles and wires, so that its plant and machinery could not be operated, was a sufficient merger into the other to render it liable for the debts of the former; but the merger did not render the property of the new company an accretion of the old company, so as to fall within a mortgage on the entire assets of the latter including all after acquired property.—*Id.*
5. **KNOWLEDGE OF AGENTS—FRAUD.**—Ordinarily a corporation is chargeable with any facts which are known to its agents, but in transactions of a dishonest character between co-employees, where one participated in the perpetration of a fraud upon the corporation for the benefit of the other, the law does not infer that the agent will communicate the facts to the corporation, and under such circumstances the corporation is not bound.—*Wells, Fargo Co.'s Express v. Walker*, 456.
6. **APPEARANCE BY AGENT—ATTEMPTED WITHDRAWAL.**—Where an agent of a foreign corporation on whom process can be served, enters appearance for such defendant corporation, after the period of over three years has elapsed without objection being made to such appearance, it is too late for the corporation to withdraw such appearance, unless it is shown that it had no knowledge of such appearance.—*Assurance Company v. Bartlett & Tyler*, 554.

See, also, **MUNICIPAL CORPORATIONS.**

COSTS.

1. **COSTS—PRINTING TRANSCRIPT.**—Costs for printing transcript of record, on appeal to this court, are improperly taxes as costs when the amount in controversy does not exceed \$1,000, such printing being purely voluntary and an unnecessary expense.—*Givens v. Veeder*, 405.
2. **STENOGRAPHERS FEES.**—The charges of a stenographer used by a master in chancery, in the absence of stipulation or agreement, can not be taxed as costs: the court having ordered the master to take the proofs and it being presumed that the master's allowance was made to cover all such services.—*Id.*
3. **SECURITY FOR.**—Where a plaintiff makes the oath required by section 2893 of the Compiled Laws of New Mexico, 1897, after suit instituted and prior to the time within which he is ruled to give security for costs, it is error for the court to abate the cause for failure to give such security, the oath, standing in the stead of the cost bond, being sufficient answer to the rule.—*Bearup v. Coffey*, 500.

COUNTY WARRANTS.

SUIT ON—LIMITATION.—It is not error for the court below to sustain a demurrer, setting up statute of limitations to a complainant declaring upon a county warrant where it appears that nearly nine years have elapsed between the date of the issuance of the warrant and the institution of this action, and there is no allegation in explanation of the reason for the long delay in presenting it for payment, and there was no offer to amend.—*Cross v. County Commissioners*, 410.

COURTHOUSE BONDS.

COUNTY COMMISSIONERS—MANDAMUS.—Chapters 6 and 33, Session Laws of 1897, are not local or special legislation within the meaning of the act of congress approved July 30, 1886, chapter 818, 24 statute 170, and mandamus lies to compel a board of county commissioners to perform a duty required by chapters 6 and 33.—*Codlin v. County Commissioners*, 565.

CREDITORS.

LIFE INSURANCE POLICY—MAY BE ASSIGNED.—A life insurance policy for a certain sum, assigned absolutely by the insured to his creditor for the cancellation of a debt, less than half the amount of the policy, was not a "wager policy" or "speculative risk," where, at the time of the death of the insured, the assignment had paid out on the policy, including the amount originally paid thereon, with the semiannual premiums and interest, and other costs and expenses, a sum amounting to nearly the face of the policy.—*Givens v. Veeder*, 256.

CRIMINAL LAW.

1. **APPEAL—TRANSCRIPT—DUTY OF CLERK.**—On appeal in a criminal case, where the appeal operates as a stay of proceedings, either by virtue of the statute as in murder cases or by order of the district court, it is the duty of the clerk of that court to send up the transcript whether appellant pay his fees therefor or not.—*Territory v. Archibeque*, 341.

2. **PERJURY—EVIDENCE—SUFFICIENCY.**—The evidence of one witness alone, not corroborated by any other evidence, is insufficient to warrant a conviction of a charge of perjury.—Territory v. Williams, 400.
3. **APPEAL—MOTION FOR NEW TRIAL—PROCEDURE.**—Alleged errors occurring at the trial in criminal cases must be called to the attention of this court by a motion for new trial, exception to the overruling of the motion must be saved and the motion and exception made a part of the record by bill of exceptions before this court will consider them.—Territory v. Archibeque, 403.
4. **APPEALS IN CRIMINAL CASES—CODE OF CIVIL PROCEDURE.**—The code of civil procedure does not control the requirements as appeals in criminal cases.—Id.
5. **APPEAL—TRANSCRIPT—WHEN DUE—STRIKING OUT BILL.**—In appeals in criminal cases it is necessary to file in the office of the clerk of the supreme court at least ten days before the first day of the court to which such appeal is returnable, a transcript of the record and proceedings. A district judge signing and sealing a bill of exceptions at a later date than authorized by the statute, exceeds his authority, and, on motion, the bill of exceptions will be stricken from the record.—Haynes v. United States, 519.
6. **FORMAL DEFECTS IN INDICTMENT—WAIVER.**—Formal defects in indictments are cured by plea and trial. By failing to demur or moving to quash and, if overruled, saving an exception, on appeal defendants are estopped from raising objections to the sufficiency of an indictment which does not render it or any judgment based thereon void.—Id.
7. **CONSOLIDATIONS OF INDICTMENTS—WAIVER.**—Separate indictments against the same persons may be consolidated where they grow out of the same transaction, and if defendants do not raise objections to such consolidation at the time, and ask for separate trials, they waive all right to object to such consolidation for the first time in the supreme court.—Id.
8. **INDICTMENT—STEALING CATTLE.**—The use of the statutory description "one neat cattle" in an indictment, is a sufficient description as commonly applied in the United States and this territory to describe a beast of bovine genus.—Territory v. Christman, 582.
9. **CONFLICT OF EVIDENCE—VERDICT—CONCLUSIVENESS.**—In a criminal case, where there is neither an absence of competent evidence against the accused nor a decided preponderance in his favor, and there is a direct conflict in the testimony, the jury's verdict is a conclusive adjudication of the facts of the case.—Territory v. Pino, 598.
10. **INSTRUCTION—REFUSAL—WHEN ERROR.**—The refusal of the court to give an instruction properly requested by defendant which is a correct statement of the law applicable to the facts in the case and consistent with a reasonable theory other than that of defendant's guilt, and not covered by any other instruction given by the court, is reversible error.—Id.
11. **RAPE—EVIDENCE—ADMISSIBILITY.**—In prosecution for rape, the prosecutrix may be asked whether she made complaint of the injury, when and to whom, and the person to whom she complained may

be called to prove the fact; but the particular facts stated by the prosecutrix are not admissible in evidence, except when elicited on cross-examination, or by way of confirming her testimony after it has been impeached.—*Territory v. Maldonado*, 629.

CUTTING TIMBER. See, PUBLIC LANDS.

DAM.

NAVIGABLE STREAMS—OBSTRUCTION—ACTS OF CONGRESS, SEPTEMBER 19, 1890, AND JULY 13, 1892. CONSTRUED.—Held: That the waters of the Rio Grande are not navigable in New Mexico, and can not be said to be navigable waters in respect to which the United States has jurisdiction within the meaning of the acts of congress of September 19, 1890, section 10, and July 13, 1892, section 3, prohibiting the erection of any dam or other structure in the navigable waters of the United States, without permission of the secretary of war; and the construction of a dam across that stream within New Mexico for irrigation purposes, is not in violation of these acts, nor of any law of the United States, nor of any treaty.—*United States v. Dam and Irrigation Co.*, 292.

DAMAGES.

1. NEGLIGENCE—EVIDENCE—WAIVER.—In an action for damages, by the administratrix of a deceased person, against defendant for negligence, in causing the intestate death in its mine, as the result of an explosion in the vicinity of the room where intestate was working, of the danger of which intestate had been apprised by the presence of a danger signal placed there by defendant's fire boss, and accepted employment.—Held: That defendant was not guilty of negligence of which plaintiff's intestate could complain, having accepted employment with an implied waiver as to there being standing gases in places in defendant's mine. If injury resulted from a fellow servant's act under such circumstances, it must be considered to have arisen from the risk incident to the employment.—*Cerrillos Coal R'y v. Deserant*, 49.
2. INSTRUCTIONS—MEASURE OF DAMAGES.—It was error to instruct the jury that a nominal plaintiff could recover for loss of comforts and protection.—*Id.*
3. MEASURE OF IN PERSONAL INJURY CASE.—In statutory actions for injuries causing death the rule is that the damages recoverable is compensation for the pecuniary loss to the parties entitled to recover; and if there are any aggravating circumstances attending the wrongful act or neglect of duty for which the defendant is responsible, then exemplary damages may be added.—*Id.*
4. TRESPASS—MEASURE OF DAMAGES—INSTRUCTION.—In an action of trespass for damages for the wrongful seizure by the sheriff of an ordinary stock of merchandise in attachment, where plaintiff resumed business, and realized the profits of it, an instruction of the court authorizing a recovery of the profits up to the time of the trial, was error.—*Cunningham v. Sugar*, 105.
5. EXEMPLARY—INSTRUCTION.—In such action, an instruction of the court allowing exemplary damages was without warrant, in the absence of any evidence that the plaintiffs in the attachment suit were guilty of gross negligence or malice in suing out the attachment.—*Id.*

DEBT. See IMPRISONMENT FOR DEBT, 1.

DECLARATION, FILING OF. See CERTIORARI, 1.

DECREE.

DECREE—OVERRULING MASTER'S CONCLUSION OF LAW—PRESUMPTION.

Where the decree expressly overrules the master's conclusions of law, it must be taken, by fair implication, as an approval of his findings of fact, and, in the absence of anything in the findings of fact against the correctness of the decree, it must be sustained.—Witt v. Cuenod, 148.

DEFINITIONS.

1. ADJACENT DEFINED—STATUTORY CONSTRUCTION.—The term "adjacent," within the meaning of the act of congress allowing the Denver and Rio Grande Railroad to take timber for construction from public lands adjacent to the right of way, does not apply to lands lying beyond the tier of townships adjoining those through which the right of way of the road extends.—U. S. v. Bachelder, 15.

DESCENTS AND DISTRIBUTIONS.

1. DESCENT'S ESTATE—COMMUNITY PROPERTY—RIGHTS OF CHILD IN ESTATE OF MOTHER.—In the absence of any statute of this territory in 1868, determining the rights of a child in the estate of a mother, dying at that time, leaving the father surviving her, they must be determined by the Spanish law on the subject so far as it was in operation in the territory at that time.—Barnett v. Barnett, 9 N. M. 205, ante; Crary v. Field, 222.
2. COMMUNITY PROPERTY—RIGHT OF SURVIVING HUSBAND TO SELL. Under the Spanish law, the surviving husband has the power to sell as much of the community property as may be necessary to pay the community debts; and any transfer of such property made by him, in the exercise of that power, conveys a valid title to the purchaser, and the heirs can not restrain him in his action as such survivor, unless it be shown that he is prostituting his power, and committing waste, to their injury.—Id.
3. COMMUNITY PROPERTY—SALE—PURCHASER'S TITLE—LEGAL PRESUMPTIONS.—Where a husband, surviving his wife, who died in 1868, sold the community property in 1882, and 1891 one of the children brought suit for her share of the property, and it did not appear that it was not sold for a consideration adequate to pay the community debts; nor was it pretended that there was any collusion or fraud in its disposition, or that the contract value was not paid; nor appeared that the proceeds were not properly applied; nor that the community estate had been so administered she could not receive her share of it without damage to an innocent purchaser; nor that she could secure redress upon the bond of the administrator,—Held: That the legal presumptions, precluding a reasonable doubt of a paramount title in the purchaser, must be applied.—Id.

DISTRICT COURT. See JURISDICTION, 2.

DIVORCE.

DECREE OF—BARS FUTURE ACTIONS.—A decree divorcing husband and wife bars any subsequent action by either against the other to enforce any right growing out of the marital relations.—*Barnett v. Barnett*, 205.

EJECTMENT.

1. **CLAIM OF TITLE—DOCUMENTS—FAILURE TO PRODUCE.**—An offer to prove a chain of title is properly refused, where the party making the offer fails to produce the documents when asked to do so.—*Lincoln Lucky etc. Min. Co. v. Hendry*, 149.
2. **COMMUNITY PROPERTY—SALE—PURCHASER'S TITLE—LEGAL PRESUMPTIONS.**—Where a husband, surviving his wife, who died in 1868, sold the community property in 1882, and in 1891 one of the children brought suit for her share of the property, and it did not appear that it was not sold for a consideration adequate to pay the community debts; nor was it pretended that there was any collusion or fraud in its disposition, or that the contract value was not paid; nor appeared that the proceeds were not properly applied; nor that the community estate had been so administered she could not receive her share of it without damages to an innocent purchaser; nor that she could not secure redress upon the bond of the administrator.—Held: That the legal presumptions, precluding a reasonable doubt of a paramount title in the purchaser, must be applied.—*Crary v. Field*, 222.
3. **ABANDONMENT OF MINING CLAIM—QUESTION FOR JURY.**—In ejectment for the possession of a mining claim, where the question of the abandonment of possession of the claim by plaintiff was in issue, it was a question of fact for the jury.—*Lockhart v. Wills*, 263.
4. **PARTIES.**—Tenants in common may join in ejectment and recover their interest demanded so held by them in common.—*Neher v. Armijo*, 325.
5. **MINING LANDS—SPANISH GRANT.**—Lands embraced within the boundaries of a Mexican or Spanish grant in New Mexico in 1893, as claimed and who was *sub judice* in the court of private land claims, were open to the exploration and purchase under the mining laws of the United States.—*Lockhart v. Wills*, 344.
6. **CLAIM OF MINING LAND—NOT PERFECTED, VOID.**—As against a subsequent locator, a location, not perfected according to the territorial laws, within the time provided becomes forfeited and void, and the ground embraced therein becomes open to location.—*Id.*
7. **SUIT AGAINST LOCATOR—EVIDENCE.**—Plaintiff, to maintain ejectment against a subsequent locator must show a valid location.—*Id.*
8. **MINING CLAIM—FORFEITURE.**—When in an ejectment suit the facts produced by plaintiff show a forfeiture of his location has taken place, is the duty of the court to instruct the jury to find for the defendants.—*Id.*
9. **MINING CLAIM—FORFEITURE—EVIDENCE.**—Where facts show that a forfeiture of plaintiff's location has taken place, for failure to perform the statutory requirements for a valid location, it is immaterial to show that such failure was a result of a conspiracy to defraud plaintiff on the part of plaintiff's co-locator with other persons who locate after forfeiture.—*Id.*

10. **MIXING CLAIM—FORFEITURE—EVIDENCE.**—When plaintiff allows his location to become forfeited by failure to perfect same, as required by law, he can not set up as an excuse for failure that prior to the expiration of the time allowed by law to perfect his location, others took adverse possession of his claim, of which he was not aware until after forfeiture.—Id.
11. **MIXING CLAIM—FORFEITURE—OUSTER NO DEFENSE.**—In order for adverse possession and ouster to furnish an excuse for not perfecting the location of a mining claim, the party offering such excuse must have in some way been prevented thereby from perfecting his location. (Lockhart v. Wills et al., 50 Pac. 318, overruled.)—Id.
12. **TITLE BY LIMITATIONS.**—Open, notorious and adverse possession by a claimant to real estate for the statutory period, either by himself or by those through or under whom he held ripens into a perfect title.—Solomon v. Yrisarri, 480.
13. **DEFECTIVELY EXECUTED DEEDS.**—That paper writings may constitute a foundation for title or a link in a chain of title, they must be executed according to the laws in force at the time of their execution.—Id.

EQUITY.

ACTIONS—REMEDY AT LAW.—If the remedy at law is not plain, adequate and complete, or if the creditor has a trust in his favor, in either case, he is not required to go first into a court of law, but may apply in the first instance to a court of equity for relief.—Early Times Dist. Co. v. Zeiger, 31.

NO TRIAL BY JURY IN—CONSTITUTIONAL LAW.—The constitutional rights of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. (Burton v. Barber, 104 U. S. 104.)—Id.

See, also, **SPECIFIC PERFORMANCE.**

ESTATES. See **DESCENTS AND DISTRIBUTIONS.**

ESTOPPEL.

CONTRACT—STATUTES—NOTICE OF CONTENTS.—The statutes are a public notice of their contents, and a complainant contracting presumably with a knowledge that defendant was limited, by the statute creating it, to a two-mill levy for the discharge of its obligations, will not be heard to complain that the trustees of defendant refused to transcend the power.—Raton Waterworks Co. v. Raton, 70.

EVIDENCE.

1. **OFFER TO PROVE TITLE BY, AND FAILURE TO PRODUCE DOCUMENTS.**—An offer to prove a chain of title is properly refused, where the party making the offer fails to produce the documents when asked to do so.—Lincoln Lucky, etc. Min. Co. v. Hendry, 149.
2. **CORPORATIONS—LEASE—MERGER—FRAUD.**—Where a majority of the stock of an electric lighting company was purchased by persons, who became directors, assumed control of the company and formed and became directors of a new company, under their control the

purpose of both being to furnish light; and the directors of the new company by virtue of their position in the old, obtained a lease of all the poles and wires of the latter, so that its plant and machinery could not be operated, the former retaining power to terminate the lease at any time, but binding the old company not to terminate it for eighteen months, a mortgage having been given, before the establishment of the new company on all the property of the old, which had become much depreciated in value; the president of the new company testifying that, but for the mortgage, the two companies would have consolidated,—Held: Conclusive evidence of fraudulent combination to defeat the mortgage.—*Santa Fe Elec. Co. v. Hitchcock*, 156.

3. **ISSUES OF FACT.**—Where the issues of fact were distinctly and clearly presented on the trial, any evidence tending to establish any of such issues was admissible, and should have gone to the jury. *Lockhart v. Wills*, 263.
4. **JUDGMENT, FOREIGN—ASSIGNMENT OF—STATUTES.**—In a suit on a judgment obtained in the court of another state, alleged to have been assigned to plaintiff, the validity of which depends on the statutes of that state, which are not proved, nor the genuineness of the judgment creditor's signature shown, a recovery can not be had. The courts of this territory can not take judicial notice of the statutes of another state; they must be proved as facts in the case. Nor is the record sufficient evidence of the assignment.—*Field v. Cain*, 283.
5. **TAKING OF TESTIMONY BEFORE MASTER—ADJOURNMENTS, WITHOUT NOTICE.**—Where it appeared from the report of a master that he began the taking of the testimony, and adjournments were had from time to time until a certain date, after which there were no adjournments, yet the taking of testimony was resumed, without notice to the parties in interest that it would be resumed, or a waiver of such notice by the appearance of the parties, it was error to receive such testimony.—*Rice v. Schofield*, 314.
6. **SPECIAL ACTS OF CONGRESS MUST BE PROVEN.**—Special acts of congress are required to be proven on the trial of a cause the same as any other fact.—*Denver & Rio Grande R'y Co. v. United States*, 389.
7. **BOOK ACCOUNTS—WHEN ADMISSIBLE.**—Books of original entry can not be used as evidence unless the statutory requirements regarding their admissibility are first complied with. The statutory provisions in this regard amend the common law rule.—*Byerts v. Robinson*, 427.
8. **MEMORANDUM OF SALE.**—The memorandum of sale was admissible in evidence to show that it included the entire stock of the vendor, and the receipt given at the time of the execution and delivery of a note is proper evidence to prove on what account said note was given.—*Id.*
9. **PROMISSORY NOTE—PAYMENT—RECEIPT.**—Defendant having offered in evidence receipts for certain payments dated subsequent to and claimed to be on account of the note given, no other debts being proven, the burden of proof thereupon shifted to plaintiff to show that said payments were on some other account than the note aforesaid.—*Id.*

10. **EX PARTE STATEMENTS.**—In a suit brought by A. B. on a note given to A. B. and C. D. and indorsed in blank by C. D. before suit is brought, an ex parte statement of C. D. concerning the execution of the note is not admissible in evidence.—*Pearce v. Strickler*, 467.
11. **WITNESS—IMPEACHMENT—REPUTATION.**—The character of the prosecutrix for chastity may be impeached only by general evidence of her reputation, and not by evidence of particular instances of unchastity.—*Territory v. Pino*, 598.
12. **ADMISSION BY PARTNER.**—An admission or declaration made by one partner as to the firm's assets and liabilities, for the purpose of obtaining credit, is competent evidence, at least in the absence of objection on that ground, to show the amount and kind of property the firm had at that time.—*Nat. Bank v. Lesser & Lewinson*, 604.
13. **BURDEN OF PROOF—LICENSE.**—Where defendants plead a license to cut and convert such timber the burden of the proof is upon defendants upon that issue.—*United States v. Gumm Bros.*, 611.
14. **LICENSE—NECESSARY PROOF.**—In order to establish license under the act of congress approved June 3, 1878, it is necessary to prove compliance with section 1 of the act, and also the rules and regulations prescribed by the secretary of the interior as required by said section.—*Id.*
15. **SECRETARY OF INTERIOR—RULES.**—Where the defendant introduces competent evidence tending to prove license, it is error to refuse instructions requested by the plaintiff embodying the rules prescribed by the secretary of the interior.—*Id.*
16. **JUDICIAL NOTICE.**—The court, in such case, will take judicial notice of such rules and regulations.—*Id.*
17. **CRIMINAL LAW—RAPE—ADMISSIBILITY.**—In prosecution for rape, the prosecutrix may be asked whether she made complaint of the injury, when and to whom, and the person to whom she complained may be called to prove the fact; but the particular facts stated by the prosecutrix are not admissible in evidence, except when elicited on cross-examination, or by way of confirming her testimony after it has been impeached.—*Territory v. Maldonado*, 629.

EXEMPTIONS.

1. **GARNISHMENT—NOTICE—SUFFICIENCY.**—In a proceeding by garnishment, of which defendant had notice, but it was not shown how he received such notice, where judgment was rendered against defendant and process of garnishment served on his debtor, defendant's counsel drawing the garnishee's answer, with instructions from defendant to garnishee's counsel to file it within the prescribed time, and several conversations occurring thereafter between defendant and them in relation thereto, defendant failing to make any claim of exemption for more than three months,—Held: That though defendant might not have known when the answer was filed, he had ample notice of the garnishment proceeding, and sufficient opportunity to make his exemption claim before entry of final judgment against the garnishee.—*New Mexico Nat. Bank v. Brooks*, 113.

2. **EXEMPTION LAWS 1887, P. 73—STATUTORY CONSTRUCTION.**—Held: That the law of 1887, exempting the personal earnings of the debtor and his minor children, for three months, from attachment or other process, was not intended to encourage extravagance and the evasion of just debts, but for the necessary support of the debtor's family and himself; and that \$3,600 a year is more than sufficient to support comfortably any average family.
See, also, **GARNISHMENT**, 3, 4.

FELLOW SERVANTS.

PERSONAL INJURIES—EXPLOSION—NEGLIGENCE.—The pitt boss of a mine, working under a superintendent who has charge of the whole property and its workings, is a fellow servant of the other employees, and the corporation is not liable to an administratrix for the death of an employee caused by an explosion occasioned by workmen going into a room where there is an accumulation of gas, over a danger signal, with a naked light, either by direction of the pitt boss, or with him.—*Deserant v. Cerrillos Coal Ry. Co.*, 495.
See, also, **NEGLIGENCE**.

FRAUD.

1. **CORPORATION — LEASE — MERGER.**—Where a majority of the stock of an electric lighting company was purchased by persons who, became directors, assumed control of the company and formed and became directors of a new company, under their control, the purpose of both being to furnish light; and the directors of the new company by virtue of their position in the old, obtained a lease of all the poles and wires of the latter, so that its plant and machinery could not be operated, the former retaining power to terminate the lease at any time but binding the old company not to terminate it for eighteen months, a mortgage having been given before the establishment of the new company on all the property of the old, which had become much depreciated in value: the president of the new company testifying that, but for the mortgage, the two companies would have consolidated,—Held: Conclusive evidence of fraudulent combination to defeat the mortgage.—*Santa Fe Elec. Co. v. Hitchcock*, 156.
2. **PRINCIPAL AND SURETY—RELEASE OF SURETY.**—Where, in a suit against a surety on a note, it appeared that the note had been given by the principal for money embezzled by him while in complainant's employ for which he had been discharged, and the surety signed the note without any knowledge of these facts, which were withheld from him by complainant and its agents, and that, had he known the facts, he would not have signed the note.—Held: That the complainant was guilty of such fraud as to vitiate the note as to the surety.—*Wells, Fargo & Co.'s Exp. v. Walker*, 170.
3. **SURETY—KNOWLEDGE—ESTOPPEL.**—Where one becomes surety for an alleged existing shortage in the accounts of another, the mere fact that he has knowledge of an unexplained irregularity (and the fact of the acceptance of the security by the creditor, under the peculiar circumstances of this case is such knowledge to the surety) is sufficient to put the surety upon inquiry; and if he fails to seek important information within his reach he can not, in the absence of fraud on the part of the creditor, set up as a defense facts then first learned which he ought to have known and considered before entering into the contract.—*Wells, Fargo Co.'s Express v. Walker*, 456.

4. **KNOWLEDGE OF AGENT.**—Ordinarily a corporation is chargeable with any facts which are known to its agents, but in transactions of a dishonest character between co-employees, where one participates in the perpetration of a fraud upon the corporation for the benefit of the other, the law does not infer that the agent will communicate the facts to the corporation, and under such circumstances the corporation is not bound.—Id.
5. **FRAUDULENT TRANSFER—RENEWAL NOTE.**—The holder of a renewal note is entitled to the same remedies against a fraudulent transfer of property as if he were proceeding upon the original note.—*Nat. Bank v. Lesser & Lewinson*, 604.
6. **BY FIRM—LIMIT OF EVIDENCE.**—Where an attachment affidavit charges a fraudulent disposition of property by a firm, plaintiff is limited in his proof to that class of transfers.—Id.
7. **TRACING PROPERTY — PARTNERSHIP — WIVES AS PURCHASERS.**—Without tracing any property or the proceeds thereof, from either of defendant partners to his wife, it is immaterial, in support of the attachment affidavit charging fraudulent disposition and concealment to show that defendants' wives became the purchasers of the firm property from the assignee after assignment for creditors.—Id.
8. **EVIDENCE—PAYMENT BY SON-IN-LAW.**—Plaintiff offered in support of its attachment affidavit evidence that the son-in-law of one defendant partner, shortly after a general assignment by the firm, paid off a mortgage on defendant's property with defendant's money,—Held: Not competent evidence to support the allegation of fraudulent disposition and concealment by the firm.—Id.
9. **EVIDENCE—TRANSFER BY MAIL.**—Plaintiff offered to show that defendants, shortly before attachment and assignment for creditors, transmitted money through the postoffice,—Held: To be competent in support of attachment affidavit.—Id.
10. **ADVANCEMENT TO HUSBAND BY WIFE.**—Where a wife advances money to her husband without any promise to repay the same or under such circumstances as not to create the relation of debtor and creditor at the time, such advancement is no consideration for a subsequent conveyance to her.—*Bank v. McClellan*, 636.
11. **GIFT TO WIFE.**—Where a husband makes a gift to his wife, as against his creditors at the time, it devolves upon the wife to show that his remaining estate was ample to satisfy their demands.—Id.
12. **TRANSFER TO MOTHER-IN-LAW.**—Where a husband conveys all of his estate to his wife's mother who thereupon shortly conveys the same to the wife, the burden of proof in a contest between her and her husband's creditor's is upon the wife to show that the conveyance was for a valuable and adequate consideration without fraudulent intent on the part of the husband or participation therein by herself and mother.—Id.
13. **FINDINGS OF REFEREE—CONCLUSIVENESS.**—Where the cause is referred to a master with the consent of the parties to find the facts and draw conclusions therefrom, and the master passes upon the weight of conflicting evidence and the credibility of witnesses, and where there is evidence to support his findings and they can not be said to be manifestly wrong, his findings of fact are to be treated as unassailable, and it is error in the court below to overrule them.—Id.

14. **HOLDER OF RENEWAL NOTE.**—The holder of a renewal note is entitled to the same remedies against a fraudulent transfer of property as if he were proceeding upon the original note.—Id.

GARNISHMENT.

1. **JUDGMENT—COLLATERAL ATTACK—APPEALS.**—On writ of error in a garnishment proceeding, where the original judgment remains unappealed from for more than one year from the date of its original entry, errors assigned in respect to such judgment are not tenable, and the judgment remaining undisposed of for that time can not now be collaterally attacked.—*Western Homestead & Irr. Co. v. First Nat. Bank*, 1.
2. **SUMMONS—SUFFICIENCY.**—In such proceeding, failure to serve the garnishee with a summons in the form prescribed by the clerks of the district courts, is not ground for reversal; it is sufficient if the service be in substantial compliance with the requirements of the statute. (*Fitzgerald v. Fitzgerald*, 137 U. S. 98.)—Id.
3. **NOTICE—SUFFICIENCY—EXEMPTION.**—In a proceeding by garnishment, of which defendant had notice, but it was not shown how he received such notice, where judgment was rendered against defendant and process of garnishment served on his debtor, defendant's counsel drawing the garnishee's answer, with instructions from defendant to garnishee's counsel to file it within the prescribed time, and several conversations occurring thereafter between defendant and them in relation thereto, defendant failing to make any claim of exemption for more than three months,—Held: That, though defendant might not have known when the answer was filed, he had ample notice of the garnishment proceeding, and sufficient opportunity to make his exemption claim before entry of final judgment against the garnishee.—*New Mexico Nat. Bank v. Brooks*, 113.
4. **FINAL JUDGMENT—RES ADJUDICATA—JURISDICTION.**—Held: That defendant having failed to file his claim of exemption before final judgment against the garnishee, such judgment was conclusive of the question, and res adjudicata, and the court without jurisdiction to order the fund garnished to be paid over to defendant.—Id.
5. **AFFIDAVIT—PRACTICE, TRIAL.**—Held: That an affidavit filed by the defendant is a garnishment proceeding, claiming exemption, is not conclusive, but may be traversed by the plaintiff.—Id.
6. **AFFIDAVIT—ISSUE—TRIAL.**—Held: That, in a garnishment proceeding, the issues raised upon the affidavit of defendant and the traverse of its truth by plaintiff, may be tried by the court without a jury, in the absence of any statute prescribing any method of inquiry in such case.—Id.
7. **INSURANCE COMPANY—INTERROGATORIES.**—An insurance company, when garnished, is bound by its answer to interrogatories filed, which show the amount of money in its hands growing out of a liability for the loss of fire.—*Assurance Company v. Bartlett & Tyler*, 554.
8. **DAMAGES, WHEN ASSESSABLE.**—When garnished, a corporation can avoid all risk and liability by making a proper showing and by paying the money garnished into court to await the order of the court concerning its disposition; and when it does not do so, but appeals, when the judgment below is affirmed it is proper for the supreme court to award damages against it, under section 3142, Compiled Laws of 1897, in addition to the judgment complained of.—Id.

GOOD WILL. See MORTGAGES AND DEEDS OF TRUST, 1.

HABEAS CORPUS.

RETURN—RELEASE FROM IMPRISONMENT.—Where, on habeas corpus, there was nothing to contradict the return of the sheriff, showing that at the date of the petition, the petitioner was not restrained of his liberty, an order releasing him from unlawful imprisonment could not be made.—*In re Brydon*, 647.

HOMESTEADS.

1. SERVICE OF NOTICE—INTERVENING PETITION—SUFFICIENCY.—Where the United States marshal in a suit on a bond was served with a notice of a claim of homestead, but refused to set apart the property, and sold the same under execution, an intervening petition alleging these facts, and that intervener was the wife of defendant, that he had abandoned his family, that the property was the homestead and place of residence of the family, and that she served the marshal with such notice before the sale, the petition was properly sustained.—*U. S. v. Lesnet*, 271.
2. EXEMPTION CLAIM—SUFFICIENCY AS AGAINST UNITED STATES.—Under an act of congress of July 14, 1870, one entitled to an exemption of homestead under the laws of New Mexico, may hold the same against the United States.—*Id.*

HUSBAND AND WIFE.

1. ACQUEST PROPERTY.—In the absence of any statute of this territory ascertaining the rights of husband and wife, after legitimate separation and during the lives of both, to the property acquired during the coverture, and of any change in the Spanish law as to such property under such status, that law upon the subject, in force at the date of the treaty of cession, must govern.—*Barnett v. Barnett*, 205.
2. COMMUNITY PROPERTY—RIGHTS OF WIFE—FORFEITURE.—While, under the Spanish law, the wife is entitled to one-half of the acquet or community property on the death of her husband, by commission of the act of adultery she forfeits that right.—*Id.*
3. PROPERTY RIGHTS—DECREE OF DIVORCE.—A decree divorcing husband and wife bars any subsequent action by either against the other to enforce any right growing out of the marital relations.—*Id.*
4. COMMUNITY PROPERTY—RIGHT OF SURVIVING HUSBAND TO SELL.—Under the Spanish law the surviving husband has the right to sell as much of the community property as may be necessary to pay the community debts; and any transfer of such property made by him, in the exercise of that power, conveys a valid title to the purchaser, and the heirs can not restrain him in his action as such survivor, unless it be shown he is prostituting his power, and committing waste, to their injury.—*Crary v. Field*, 222.
5. COMMUNITY PROPERTY—SALE—RIGHTS OF BONA FIDE PURCHASER.—Under the Spanish law, the rights of a bona fide purchaser of community property are not affected by the fact that the surviving husband fails to apply the proceeds of a sale made by him alone to the payment of the community debts.—*Id.*

6. **COMMUNITY PROPERTY—SALE—PURCHASER'S TITLE—PRESUMPTIONS.**
—Where a husband, surviving his wife, who died in 1868, sold the community property in 1882, and in 1891 one of the children brought suit for her share of the property, and it did not appear that it was not sold for a consideration adequate to pay the community debts; nor was it pretended that there was any collusion or fraud in its disposition, or that the contract value was not paid; nor appeared that the proceeds were not properly applied; nor that the community estate had been so administered she could not receive her share of it without damage to an innocent purchaser; nor that she could not secure redress upon the bond of the administrator,—Held: That the legal presumptions, precluding a reasonable doubt of a paramount title in the purchaser, must be applied.—Id.
7. **COMMUNITY PROPERTY—PRESUMPTION**—The legal presumption that property acquired by either husband or wife during the matrimony is community property, may be overcome by clear and conclusive proof to the contrary.—*Neher v. Armijo*, 325.
8. **ADVANCING MONEY TO HUSBAND.**—Where a wife advances money to her husband without any promise to repay the same or under such circumstances as not to create the relation of debtor and creditor at the time, such advancement is no consideration for a subsequent conveyance to her.—*Bank v. McClelland*, 636.
9. **GIFT TO WIFE.**—Where a husband makes a gift to his wife, as against his creditors at the time, it devolves upon the wife to show that his remaining estate was ample to satisfy their demands.—Id.
10. **FRAUDULENT TRANSFER OF PROPERTY.**—Where a husband conveys all of his estate to his wife's mother who thereupon shortly conveys the same to the wife, the burden of proof in a contest between her and her husband's creditors, is upon the wife to show that the conveyance was for a valuable and adequate consideration without fraudulent intent on the part of the husband or participation therein by herself and mother.—Id.

IMPRISONMENT FOR DEBT.

1. **PHYSICIANS AND SURGEONS—ACT FEBRUARY 27, 1895—CONSTRUCTION.**—There is no inconsistency between section 8 of the act of February 27, 1895, prescribing a penalty for practicing medicine or surgery in this territory without a certificate from the board of health, and section 9 of the same act, providing for imprisonment for failure to pay the penalty: that act is simply a valid exercise of the police power of the territory.—*In re Roe Chung*, 130.
2. **THIRTY DAY STATUTE REPEALED—JUSTICES OF THE PEACE—JURISDICTION.**—Section 2321, of the act of 1876, limiting imprisonment to thirty days, was repealed by the act of 1889, providing that all fines and costs of imprisonment may be suffered at the rate of one dollar per day until the days amount to the fine and costs, by which jurisdiction was conferred on justices of the peace to sentence for a longer period.—Id.

INSTRUCTIONS.

1. **PERSONAL INJURY CASE—PRACTICE.**—Where two theories were advanced by plaintiff and defendant, respectively, as to the cause of the explosion, and it was not clear upon which theory the jury found defendant liable, the court erred in not clearly drawing their attention to the law applicable to both theories.—*Cerrillos Coal R'y Co. v. Deserant*, 49.

2. **BURDEN OF PROOF.**—Instructions, the general import of which, relating to the duty of defendant, was not that reasonable diligence and care should be exercised by defendant in an endeavor to perform its duty, but that the duty must be performed or defendant be deemed guilty of “culpable negligence,” were erroneous.—Id.
3. **DUTY TO VENTILATE MINE.**—In such case, where no attack was made upon the system or plan of ventilation, it was misleading and error to instruct the jury that it was incumbent on defendant to use necessary and suitable machinery for forcing a sufficient quantity of pure air into the mine.—Id.
4. **MINE—VENTILATION.**—An instruction that it was incumbent on defendant to keep open all air courses, etc., in said mine for the proper circulation of the air while the men were at work, and provide a sufficient amount of pure air for the safe and proper ventilation of the mine, for the protection of the men so working, was faulty in implying that defendant guaranteed these things.—Id.
5. **NOMINAL PLAINTIFF—MEASURE OF DAMAGES.**—It was error to instruct the jury that a nominal plaintiff could recover for loss of comforts and protection.—Id.
6. **TRESPASS—MEASURE OF DAMAGES.**—In an action of trespass for damages for the wrongful seizure by the sheriff of an ordinary stock of merchandise in attachment, where plaintiff resumed business, and realized the profits of it, an instruction of the court authorizing a recovery of the profits up to the time of the trial was error.—*Cunningham v. Sugar*, 105.
7. **EXEMPLARY DAMAGES.**—In such action, an instruction of the court allowing exemplary damages was without warrant, in the absence of any evidence that plaintiffs in the attachment suit were guilty of gross negligence or malice in suing out the attachment.—Id.
8. **WHEN THOSE GIVEN COVER THE CASE, NOT ERROR TO REFUSE OTHERS.**—Where requests to charge the jury, submitted by defendant, were fully covered by the charge of the court, defendant could not complain.—*Lincoln, Lucky, etc., Min. Co. v. Hendry*, 149.

INSURANCE.

ASSIGNMENT OF POLICY FOR CANCELLATION OF DEBT.—A life insurance policy for a certain sum, assigned absolutely by the insured to his creditor for the cancellation of a debt, less than half the amount of the policy, was not a “wager policy” or “speculative risk,” where at the time of the death of the insured, the assignee had paid out on the policy, including the amount originally paid thereon, with the semiannual premiums and interest, and other costs and expenses, a sum amounting to nearly the face of the policy.—*Givens v. Veeder*, 256.

JUDICIAL SALES. See **SALES**.

JUDGMENTS.

1. **CAN NOT BE ATTACKED, WHEN—GARNISHMENT.**—On writ of error in a garnishment proceeding, where the original judgment remains unappealed from for more than one year from the date of its original entry, errors assigned in respect to such judgment are not tenable, and the judgment remaining undisposed for that time can not be collaterally attacked.—*Western Homestead & Irr. Co. v. First Nat. Bank*, 1.

2. **BY DEFAULT—RECITAL.**—In a judgment by default, it is not necessary to recite that defendant has been called.—*Rio Grande Irr. & Col. Co. v. Gildersleeve*, 12.
3. **CORPORATIONS—WITHDRAWAL OF APPEARANCE—RATIFICATION.**—Defendant could not complain of the absence of an order granting leave to withdraw its appearance, by attorney, where the court, in granting a judgment by default, ratified the act of withdrawal.—*Id.*
4. **MOTION TO VACATE—SUFFICIENCY—PRACTICE.**—It was not error to overrule a second motion to vacate a judgment by default, where no motion to vacate the judgment was filed until two months after its entry, and no affidavit of merits for a year, and not until after the first motion had been overruled.—*Id.*
5. **PRACTICE—WRIT OF ERROR—TIME FOR TAKING.**—Where defendant failed to give notice of intention to file a motion for new trial, the year from final judgment, limited for appeal or writ of error, did not begin to run till the determination of the motion, though judgment was entered on the same day the verdict was returned under the rule of the court requiring it.—*Pearce v. Strickler*, 46.
6. **FINAL JUDGMENT—RES ADJUDICATA—JURISDICTION.**—Held: That defendant having failed to file his claim of exemption before final judgment against the garnishee, such judgment was conclusive of the question, and *res adjudicata*, and the court without jurisdiction to order the fund garnished to be paid over to defendant.—*New Mexico Nat. Bank v. Brooks*, 113.
7. **WRIT OF PROHIBITION—DISMISSAL.**—Where judgment was regularly rendered but not formerly entered, before notice of writ of prohibition, the application for the writ might have been dismissed on that ground.—*In re Roe Chung*, 130.
8. **OF FOREIGN COURTS—ASSIGNMENT OF—EVIDENCE.**—In a suit on a judgment obtained in the court of another state, alleged to have been assigned to plaintiff, the validity of which depends on the statutes of that state, which are not proved, nor the genuineness of the judgment creditor's signature shown, a recovery can not be had. The courts of this territory can not take judicial notice of the statutes of another state; they must be proved as facts in the case. Nor is the record sufficient evidence of the assignment.—*Field v. Cain*, 283.
9. **FOREIGN—SEVEN YEARS' LIMITATION—STATUTORY CONSTRUCTION.**—Held: That by section 2, of the act of 1891, it was the intention of the legislature to give holders of foreign judgments, existing at the time of the passage of the act, one year from that date within which to commence their actions, and if not brought within that period, then such actions to be forever barred; and the fact that defendant came into this territory for the first time three years after the time within which the right of action became barred, did not remove the bar, nor interrupt the continuous running of the statutes.—*Stern & Krauss v. Bates*, 286.
10. **LIMITATIONS—NON-RESIDENTS—COMP. LAWS, 1884, SEC. 1868.**—Held: That section 1868, Laws 1884, providing that if, after a cause of action accrues, a defendant moves out of this territory, the time during which he shall be a non-resident of the territory shall not be included in computing any of the periods of limitation therein provided, applies to domestic judgments only.—*Id.*

11. **WITHOUT NOTICE—BOND.**—Where a paper purporting to be a “bond” filed in a cause pending the hearing, conditioned to answer any judgment that might be recovered against the principal, did not appear to have been acknowledged before the court or judge, and the persons purporting to be sureties on the bond were not before the court, were not parties to the cause, nor given any notice of the proceedings against them, a judgment against such persons was unauthorized and erroneous.—*Rice v. Schofield*, 314.
12. **REVIVAL—SCIRE FACIAS—LIMITATION.**—A judgment barred by statutes of limitation of seven years, section 1861, Compiled Laws, 1897, can not be revived by scire facias.—*Browne & Manzanares Co. v. Chavez*, 316.
13. **IN REM—SERVICE BY PUBLICATION.**—The court has jurisdiction to render a judgment in rem, where a levy of defendant’s property has been made under a valid writ of attachment, and service by publication had as required by law, notwithstanding the return of the officer was not made until after judgment was taken.—*Fruit Exchange v. Stamm*, 361.
14. **EXCESSIVE DAMAGES—REMITTITUR.**—To render judgment for an amount in excess of plaintiff’s claim is harmless error where the judgment is in rem only and the proceeds of the property levied upon and sold are insufficient to pay the amount actually due. A remittitur of the excess in such case is unnecessary.—*Id.*
15. **STATUTES REPEALED—INFERENCE WITH ACEQUIUS.**—Section 39, Compiled Laws of 1884 is repealed by chapter I of the laws of 1895, and a judgment entered under the former subsequent to the passage of the latter act is illegal and void.—*Levy v. Ortega*, 391.
16. **IN CROSS-ACTIONS—SET-OFF.**—Judgments in cross-actions may be set off, the one against the other, when the parties in interest are the same, on motion addressed to the court in which one or both of the actions is pending.—*Scholle v. Pino*, 393.
17. **SET-OFF—ASSIGNMENTS.**—If, after both such judgments or claims are matured, one party assigns his judgment or claim, such set-off will be allowed notwithstanding such assignment.—*Id.*
18. **ATTACHMENT—APPEAL BEFORE FINAL JUDGMENT.**—When an affidavit in attachment is traversed and trial is had on the issues raised, an appeal can not be taken from the judgment until final judgment is entered in the main case to which the attachment is auxiliary.—*Schofield v. American Valley Co.*, 485.
19. **DECREE—WHEN APPEAL WILL LIE.**—A decree under a bill for the sale of mortgaged property ordering payment of a specified sum of money to plaintiffs, that a master or trustee sell the premises, and permitting the case to pend in the court awaiting the master’s report, is a final decree which may be appealed from.—*Lohman v. Cox*, 503.
20. **BY DEFAULT—WHEN VOID.**—Defendants in a suit at law or in equity have the whole of the last rule day within which to plead, and a default judgment taken prior to the expiration of the whole of that day is void.—*Id.*

JURISDICTION.

1. PRACTICE—MOTION FOR NEW TRIAL—POSTPONMENT OF CONSIDERATION.—Where the court entertained a motion for new trial, the mere failure of the court to pass upon the motion within the thirty days required by rule of court did not operate to divest jurisdiction over it, but is rather to be construed as deferring its action upon it for good cause, within its power, to further consider the motion.—*Pearce v. Strickler*, 46.
2. OF DISTRICT COURT—CERTIORARI—APPELLATE PRACTICE.—Held: Where, as here, it is clear that the district court had jurisdiction to make the order sought to be vacated, this court will not consider the question whether or not the writ of certiorari, not being in aid of appellate jurisdiction, can legally issue to that court. *SMITH*, C. J., dissenting.—*In re Lewisohn*, 101.

JURY TRIAL.

1. EQUITY—CONSTITUTIONAL LAW.—The constitutional right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. (*Burton v. Barber*, 104 U. S. 104.)—*Early Times Dist. Co. v. Zeiger*, 31.
2. GARNISHMENT—AFFIDAVIT—ISSUES—TRIAL.—Held: That, in a garnishment proceeding, the issues raised upon the affidavit of defendant and the traverse of its truth by plaintiff, may be tried by the court without a jury, in the absence of any statute prescribing any method of inquiry in such case.—*New Mexico Nat. Bank v. Brooks*, 113.
3. PEREMPTORY INSTRUCTION.—Where a jury is impaneled and evidence taken before it on the trial of a cause, it is a jury trial within the meaning of section 2685, sub-section 133, Compiled Laws of 1897, though the jury rendered its verdict by direction of the court.—*Schofield v. Slaughter*, 422.

JUSTICES OF PEACE.

IMPRISONMENT FOR DEBT—JURISDICTION.—Section 2321 of the act of 1876, limiting imprisonment to thirty days, was repealed by the act of 1889, providing that all fines and costs of imprisonment may be suffered at the rate of one dollar per day until the days amount to the fine and costs, by which jurisdiction was conferred on justices of the peace to sentence for a longer period.—*In re Roe Chung*, 130.

LEASE. See CORPORATIONS, 3, 4.

LICENSE.

1. PUBLIC LANDS—CUTTING TIMBER—PRESUMPTION—BURDEN OF PROOF.—In actions in trover for alleged unlawful cutting of timber from the public domain, when the defendant proves that it had a lawful right, under a grant given by act of congress, to enter on public lands adjacent to its railroad line, and cut timber therefrom, for certain specified purposes, the presumption is that such cutting was done in accordance with the terms of the act, and not contrary thereto. The burden of proof is on the plaintiff to show that the grantee exceeded the terms of its grant, and not on the defendant to show that it had not.—*Denver & Rio Grande Railroad Co. v. United States*, 382.

3. **CUTTING TIMBER—BURDEN OF PROOF.**—Where defendants plead a license to cut and convert such timber the burden of the proof is upon defendants upon that issue.—*United States v. Gumm Bros.*, 611.
3. **CUTTING TIMBER—SUFFICIENCY OF PROOF.**—In order to establish license under the act of congress approved June 3, 1878, it is necessary to prove compliance with section 1 of the act, and also the rules and regulations prescribed by the secretary of the interior as required by said section.—*Id.*
4. **INSTRUCTION, WHEN NECESSARY.**—Where the defendant introduces competent evidence tending to prove license, it is error to refuse instructions requested by the plaintiff embodying the rules prescribed by the secretary of the interior.—*Id.*

LIENS.

1. **SUPERINTENDENT OF MINE HAS NO LIEN, WHEN—STATUTORY CONSTRUCTION.**—Held: That the superintendent and general manager of a mine, who has merely the management of the mine, and does not actually perform any bodily labor upon or in it, is not entitled to the benefit of section 1520, Compiled Laws, giving to every person performing labor upon or in a mine a lien upon the mine.—*Boyle v. Mountain Key Mining Co.*, 237.
2. **SUPERINTENDENT OF MINE—CLAIM OF LIEN VOID, WHEN.**—Held: that the superintendent's claim, being for a fixed sum for all his services, part of which were not within the scope of the statute, *supra*, is void in toto.—*Id.*
See, also, **MECHANIC'S LIEN.**

LIMITATIONS. •

1. **JUDGMENT, FOREIGN—SEVEN YEAR LIMITATIONS—STATUTORY CONSTRUCTION.**—Held: That by section 2, of the act of 1891, it was the intention of the legislature to give holders of foreign judgment, existing at the time of the passage of the act, one year from that date within which to commence their actions, and if not brought within that period, then such actions to be forever barred; and the fact that defendant came into this territory for the first time three years after the time within which the right of action became barred, did not remove the bar, nor interrupt the continuous running of the statute.—*Stern & Krauss v. Bates*, 286.
2. **NON-RESIDENTS—COMP. LAWS 1884, SEC. 1868—STATUTORY CONSTRUCTION.**—Held: That section 1868, Laws 1884, providing that if, after a cause of action accrues, a defendant moves out of this territory, the time during which he shall be a non-resident of the territory shall not be included in computing any of the periods of limitations therein provided, applies to domestic judgments only.—*Id.*
3. **JUDGMENT—REVIVAL—SCIRE FACIAS.**—A judgment barred by statute of limitations of seven years, section 1861, Compiled Laws 1897, can not be revived by scire facias.—*Browne & Manzanares Company v. Chavez*, 316.
4. **ADVERSE POSSESSION—ESTOPPEL—DEFENSES.**—Where one holds under color of title for statutory period the fact that the grantors in the deed under which he entered derived their title from a common

ancestor with the plaintiff will not stop him from setting up defense of adverse possession as against all demandants not under disability.—*Neher v. Armijo*, 325.

5. **ADVERSE POSSESSION—PARTY UNDER DISABILITY.**—The statute of limitations creating title by adverse possession will not run against one in whose favor a right of action accrued while under a disability and who commenced his action within the statutory period after the removal of the disability.—*Id.*
6. **COUNTY WARRANTS.**—It is not error for the court below to sustain a demurrer, setting up statute of limitations to a complaint declaring upon a county warrant where it appears that nearly nine years have elapsed between the date of the issuance of the warrant and the institution of this action, and there is no allegation in explanation of the reason for the long delay in presenting it for payment, and there was no offer to amend.—*Cross v. County Commissioners*, 410.
7. **JUDGMENT—LACHES—WARRANTS.**—It is not error for the court to enter judgment against plaintiff, a plea of the statute of limitations having been interposed, on a petition to fund city warrants, where there is nothing in the record in explanation of the long delay of ten years or more, extending from the date of the city's indorsement upon the warrants of "not paid for want of funds" to the date of bringing suit, in instituting the action.—*Miller v. City of Socorro*, 416.
8. **TITLE BY ADVERSE POSSESSION.**—Open, notorious and adverse possession by a claimant to real estate for the statutory period either by himself or by those through or under whom he held ripens into a perfect title.—*Solomon v. Yresarri*, 480.

MANDAMUS.

1. **CONTRACT—SPECIFIC PERFORMANCE—JURISDICTION.**—While a court of equity, in an action against a town for the specific performance of a contract for the payment of water rents, may declare the validity of the contract, it has no jurisdiction to compel the town to make a levy, the remedy in such case being by mandamus.—*Raton Waterworks Co. v. Raton*, 70.
2. **INTERLOCUTORY JUDGMENT—APPEAL.**—Mandamus will not lie to compel an appeal to the district court from a merely interlocutory order of the probate court.—*Territory ex rel. v. Hubbell*, 560.

MASTER.

1. **EQUITY PRACTICE—FINDINGS OF FACT BY MASTER.**—The findings of a special master of chancery on disputed facts referred to him, have the same force and effect as the special verdict of a jury.—*Field v. Romero*, 7 N. M. 630; *De Cordova v. Korte*, *Id.* 678; *Jarrell v. Barnett*, 254.
2. **TAKING OF TESTIMONY BEFORE MASTER—ADJOURNMENT.**—Where it appeared from the report of a master that he began the taking of testimony, and adjournments were had from time to time until a certain day, after which there were no adjournments, yet the taking of the testimony was resumed, without notice to the parties in interest that it would be resumed, or the waiver of such notice by the appearance of the parties, it was error to receive such testimony.—*Rice v. Schofield*, 314.

See, also, APPELLATE PRACTICE, 1, 4; PRACTICE, 19, 20.

MECHANIC'S LIEN.

1. **PROPERTY SUBJECT TO.**—A person who is entitled to a mechanic's lien by reason of material furnished or work done, is entitled to a lien on the whole of the building constructed or improved, together with so much of the lot or lots on which the building so constructed or improved stands, as may be necessary for the full use and enjoyment of the property.—*Mountain Electric Co. v. Miles*, 512.
2. **COLLATERAL SECURITY—WAIVER.**—The acceptance of a promissory note by the contractor from the debtor, which promissory note falls due before the expiration of the statutory period, within which such lien may be foreclosed does not impair the contractor's lien nor his rights to such lien. The taking of such promissory note by the contractor from the debtor is not a taking of collateral security in the legal sense of the phrase "collateral security."—*Id.*
See, also, **LIENS**.

MERGER.

CORPORATIONS—LEASE—LIABILITY OF NEW COMPANY—AFTER ACQUIRED PROPERTY.—A lease by one corporation to another of all its poles and wires, so that its plant and machinery could not be operated, was a sufficient merger into the other to render it liable for the debts of the former; but the merger did not render the property of the new company an accretion of the old company, so as to fall within a mortgage on the entire assets of the latter including all after acquired property.—*Santa Fe Elec. Co. v. Hitchcock*, 156.

MINES AND MINING.

1. **MINING LANDS—SPANISH GRANT—LOCATION OF MINE—FORFEITURE—EJECTMENT.**—Lands embraced within the boundaries of a Mexican or Spanish grant in New Mexico, in 1893, as claimed and who was sub judice in the court of private land claims, were open to explorations and purchase under the mining laws of the United States.—*Lockhart v. Wills*, 344.
2. **DEFENDANT'S FRAUDULENT CONDUCT.**—Where facts show that a forfeiture of plaintiff's location has taken place, for failure to perform the statutory requirements for a valid location, it is immaterial to show that such failure was a result of a conspiracy to defraud plaintiff on the part of plaintiff's co-locator with other persons who locate after forfeiture.—*Id.*
3. **PREVENTING POSSESSION.**—When plaintiff allows his location to become forfeited by failure to perfect same, as required by law, he can not set up as an excuse for failure that prior to the expiration of the time allowed by law to perfect his location, others took adverse possession of his claim, of which he was not aware until after forfeiture.—*Id.*
4. **FORFEITING CLAIM—EXCUSE—SUFFICIENCY.**—In order for adverse possession and ouster to furnish an excuse for not perfecting the location of a mining claim, the party offering such excuse must have in some way been prevented thereby from perfecting his location.—*Lockhart v. Wills et al.*, 50 Pac. Rep. 318, overruled.—*Id.*
5. **INJURY TO EMPLOYEE—EXPLOSION—FELLOW SERVANT—NEGLIGENCE.**—The pit boss of a mine, working under a superintendent who has charge of the whole property and its workings, is a fellow servant of the other employees, and the corporation is not liable to an ad-

ministratrix for the death of an employee caused by an explosion occasioned by workmen going into a room where there is an accumulation of gas, over a danger signal, with a naked light, either by the direction of the pitt boss, or with him.—*Deserant v. Cerrillos Coal Ry. Co.*, 495.

See, also, **LIENS**; **EJECTMENT**, 5, 6.

MORTGAGES AND DEEDS OF TRUST.

1. **OF BUSINESS DOES NOT INCLUDE GOOD WILL.**—The mortgage of the entire assets of a business can not be construed to include its good will, in the absence of any conveyance of the good will either expressly or by fair implication.—*Santa Fe Elec. Co. v. Hitchcock*, 156.
2. **CORPORATIONS—LEASE—MERGER—LIABILITY OF NEW COMPANY.—AFTER ACQUIRED PROPERTY.**—A lease by one corporation to another of all its poles and wires, so that its plant and machinery could not be operated, was a sufficient merger into the other to render it liable for the debts of the former; but the merger did not render the property of the new company an accretion of the old company, so as to fall within a mortgage on the entire assets of the latter, including all after acquired property.—*Id.*
3. **DECREE—WHEN APPEAL WILL LIE.**—A decree under a bill for the sale of mortgaged property ordering payment of a specified sum of money to plaintiffs, that a master or trustee sell the premises, and permitting the case to pend in the court awaiting the master's report, is a final decree which may be appealed from.—*Lohman v. Cox*, 503.

See, also, **CORPORATIONS**, 3.

MOTION FOR NEW TRIAL.

1. **NO NOTICE OF INTENTION TO FILE.**—Where defendant failed to give notice of intention to file a motion for new trial, the year from final judgment, limited for appeal or writ of error, did not begin to run till the determination of the motion, though judgment was entered on the same day the verdict was returned under the rule of the court requiring it.—*Pearce v. Strickler*, 46. *
2. **POSTPONMENT OF CONSIDERATION—PRACTICE.**—Where the court entertained a motion for new trial, the mere failure of the court to pass upon the motion within the thirty days required by rule of court did not operate to divest jurisdiction over it, but is rather to be construed as deferring its action upon it for good cause, within its power, to further consider the motion.—*Id.*

MOTION TO VACATE JUDGMENT. See **JUDGMENTS**, 4.

MUNICIPAL CORPORATIONS.

1. **CONTRACT—SPECIAL TAX LEVY—STATUTORY CONSTRUCTION.**—Held: That paragraph 71, section 1622, Compiled Laws 1884, providing that the special tax therein authorized for the payment of water rents shall not exceed the sum of two mills on the dollar for any year, is a limitation on the sum to be paid therefor by special tax, and an inhibition on the trustees of the town of Raton from paying any more than the sum derived from the two-mill levy on the dollar upon the property subject to taxation within its corporate limits.—*Raton Waterworks Co. v. Raton*, 70.

2. **TAXATION BY TOWNS—STATUTORY CONSTRUCTION.**—Nor is the effect of paragraph 71, *supra*, changed by paragraphs 2, 3, 6, section 1622, Compiled Laws 1884, authorizing and directing the town of Raton and all similar municipal corporations to assess and levy taxes for general and special purposes, and when collected to be applied “only” to the purposes in the ordinance “No. 10” specified.—*Id.*
3. **CONTRACTS—STATUTORY CONSTRUCTION.**—The power to make the contract in question and to execute the proprietary grant and business portion of a quasi public nature, did not carry with it the power to depart from the mode prescribed by the statute for raising revenues with which to pay for the supply of water so contracted to be furnished.—*Id.*
4. **CONTRACT OF TOWN—CONSTRUCTION.**—The contract of a town to pay more than it has the power to collect by taxation is not void, but obligates the town to exhaust its power, if necessary, to collect a tax sufficient within the statutory limitation of levy of two mills upon the entire taxable property within its jurisdiction.—*Id.*
5. **STREET IMPROVEMENTS—PETITION—SPECIAL ASSESSMENT—VALIDITY.**—A petition by the owners of at least one-half of the property fronting upon a street in a municipal corporation, is a jurisdictional prerequisite to the validity of a special assessment upon such abutting property for street grading and improvement.—*Town of Roswell v. Dominice*, 624.

See, also, **CORPORATIONS; MANDAMUS**, 1.

NAVIGABLE STREAMS. See **RIVERS**.

NEGLIGENCE.

1. **PERSONAL INJURY CASE—EVIDENCE—WAIVER.**—In an action for damages, by the administratrix of a deceased person, against defendant for negligence in causing intestate's death in its mine, as the result of an explosion in the vicinity of the room where intestate was working, of the danger of which intestate had been apprised by the presence of a danger signal placed there by defendant's fire boss, and accepted employment,—Held: That defendant was not guilty of negligence of which plaintiff's intestate could complain, having accepted employment with an implied waiver as to there being standing gases in places in defendant's mine. If injury resulted from a fellow servant's act, under such circumstances, it must be considered to have arisen from the risk incident to the employment.—*Cerrillos Coal Ry. Co. v. Deserant*, 49.
2. **INJURY TO EMPLOYEE—BURDEN OF PROOF.**—In a suit brought to recover for the death of a coal miner, who is killed in an explosion in a coal mine, where the plaintiff claims that the explosion was caused by an air course being partially obstructed by accumulation of water so that sufficient air was not passing through it to properly ventilate the mine, the burden of proof is on the plaintiff to show that such air course was so obstructed that sufficient air was not passing through it.—*Deserant v. Cerrillos Coal R'y Co.*, 495.
3. **FELLOW SERVANT—EXPLOSION IN MINE.**—The pitt boss of a mine, working under a superintendent who has charge of the whole property and its workings, is a fellow servant of the other employees, and the corporation is not liable to an administratrix for the death of an employee caused by an explosion occasioned by workmen going

into a room where there is an accumulation of gas, over a danger signal, with a naked light, either by the direction of the pitt boss, or with him.—Id.

NEGOTIABLE INSTRUMENTS. See NOTES.

NOTES.

1. **SUIT ON—MASTER'S FINDINGS OF FACT—SUFFICIENCY.**—In a suit on a note, referred by consent to a master, his findings of fact, which were sustained by the evidence, were conclusive. (Field v. Romero, 7 N. M. 630; De Cordova v. Korte, Id. 678.)—Wells, Fargo & Co.'s Exp. v. Walker, 170.
2. **PRINCIPAL AND SURETY—FRAUD—RELEASE OF SURETY.**—Where, in a suit against a surety on a note, it appeared that the note had been given by the principal for money embezzled by him while in complainant's employ, for which he had been discharged, and the surety signed the note without any knowledge of these facts, which were withheld from him by complainant and its agents, and that, had he known the facts, he would not have signed the note,—Held: That complainant was guilty of such fraud as to vitiate the note as to the surety.—Id.
3. **BOOKS—MEMORANDA OF SALE.**—The memorandum of sale was admissible in evidence to show that it included the entire stock of the vendor, and the receipt given at the time of the execution and delivery of the note is proper evidence to prove on what account said note was given.—Byerts v. Robinson, 427.
4. **PAYMENT—RECEIPT.**—Defendant having offered in evidence receipts for certain payments dated subsequent to and claimed to be on account of the note given, no other debts being proven, the burden of proof thereupon shifted to plaintiff to show that said payments were on some other account than the note aforesaid.—Id.
5. **ASSIGNMENT—DEFENSES.**—A purchaser of a note overdue takes it subject to all defenses which may be shown against his assignor who acquired it at maturity by paying the money due to the holder.—Lee v. Field, 435.
6. **INDEMNITY AGAINST LOSS—EQUITABLE DEFENSE.**—A bond of indemnity against loss executed by a third person to an accommodation maker of the note is an equitable and not a legal defense, and is not properly pleadable or shown in evidence in an action at law upon the note under the common system brought by the holder who acquired the paper when it was overdue from the obligor.—Id.
7. **PAYMENT BY STRANGER.**—Payment by a stranger to a promissory note of the money due to the holder without any agreement, express or implied, to purchase the same extinguishes the note.—Id.
8. **PAYMENT OR PURCHASE.**—It was error to exclude evidence tending to show whether when a note is presented for payment the transaction was payment or purchase of the note.—Id.
9. **PAYMENT AT MATURITY.**—Where a stranger pays the money due on a note at maturity to the holder, it is necessary in order to constitute a purchase that there be an agreement express or implied on the part of the holder to sell and on the part of the purchaser to buy.—Id.

10. **PARTNERSHIP—INDIVIDUAL PAYEES.**—A promissory note drawn to two persons in their individual names establishes a joint ownership, and not a partnership between the parties to whom the note is given.—*Pearce v. Strickler*, 467.
11. **JOINT OWNERSHIP.**—In a suit brought by A. B. on a note given to A. B. and C. D. and indorsed in blank by C. D. before suit is brought, an ex parte statement of C. D. concerning the execution of the note is not admissible in evidence.—*Id.*
12. **FRAUDULENT TRANSFER—RENEWAL NOTE.**—The holder of a renewal note is entitled to the same remedies against a fraudulent transfer of property as if he were proceeding upon the original note.—*Nat. Bank v. Lesser & Lewinson*, 604.
13. **HOLDER OF RENEWAL NOTE—REMEDIES.**—The holder of a renewal note is entitled to the same remedies against a fraudulent transfer of property as if he were proceeding upon the original note.—*Nat. Bank of Albuquerque v. McClellan*, 636.

See, also, **HOMESTEADS**, 1.

NOTICE.

TAKING OF A TESTIMONY BEFORE MASTER—ADJOURNMENTS. WITHOUT NOTICE.—Where it appeared from the report of a master that he began the taking of the testimony, and adjournments were had from time to time until a certain date, after which there were no adjournments, yet the taking of testimony was resumed, without notice to the parties in interest that it would be resumed, or a waiver of such notice by the appearance of the parties, it was error to receive such testimony.—*Rice v. Schofield*, 314.

JUDGMENT WITHOUT NOTICE—BOND.—Where a paper purporting to be a "bond" filed in a cause pending the hearing, conditioned to answer any judgment that might be recovered against the principal, did not appear to have been acknowledged before the court or judge, and the persons purporting to be sureties on the bond were not before the court, were not parties to the cause, nor given any notice of the proceedings against them, a judgment against such persons was unauthorized and erroneous.—*Id.*

See, also, **MOTION FOR NEW TRIAL**, 1; **STATUTES**, 1; **GARNISHMENT**, 3; **EVIDENCE**, 4.

NUNC PRO TUNC ORDER. See **CERTIORARI**, 1.

OUSTER.

NO DIFFERENCE BETWEEN—UPON AND UNDER SURFACE, WHEN.—There is no distinction between an ouster upon the surface and an ouster under the surface of the earth, except in cases arising under the mining laws by virtue of section 2322, Rev. Stat. U. S.—*Lincoln Lucky, etc. Min. Co. v. Hendry*, 149.

PARENT AND CHILD.

SUPPORT—WAGES—ESTOPPEL.—When a person is living *in loco parentis* with another, both are estopped from claiming for wages or services performed on the one hand, or for board and necessities furnished on the other, unless an express contract for compensation is proved.—*Garcia v. Candelaria*, 374.

PARTIES TO ACTION.

1. **EJECTMENT—TENANTS IN COMMON.**—Tenants in common may join in ejectment and recover their interest demanded so held by them in common.—*Neher v. Armijo*, 325.
2. **AMENDMENT TO PETITION.**—Under section 1911, Comp. Laws 1884, an order allowing plaintiff to amend by striking out parties plaintiff before trial and without objection is not erroneous, no injury appearing to have resulted to any of the parties.—*Id.*
3. **TROVER—CUTTING TIMBER FROM PUBLIC LAND.**—Where the United States sues in trover, for damages for the cutting and converting to the defendants use timber cut from the public lands, defendants are sued individually as well as under the firm name of Gumm Bros., it is not error for the court to overrule a demurrer to a plea in abatement denying existence of such firm, and alleging existence of firm under another name.—In such a case a partner may be sued individually without regard to the partnership.—*United States v. Gumm Bros.*, 611.

PARTNERSHIP.

1. **CONTRACT—CONSTRUCTION.**—Where, on an agreement between partners, that the partnership should “stand dissolved from and after” a named date, the retiring partner to retain an interest in the accruing profits of the new firm until a certain date, when an appraisal of the firms assets would be made and a final accounting had, an action of assumpsit was brought by the new firm as such on an account against the retired partner for an alleged indebtedness previously accruing,—Held: That the action could not be maintained.—*Wormser & Co. v. Landaner*, 23.
2. **JOINT OWNERSHIP.**—Where A. B. and C. D. agree to sell shares of stock owned by them individually and deposit the proceeds thereof in a bank in the name of both, jointly, a partnership is not thereby created between them.—*Pearce v. Strickler*, 467.
3. **INDIVIDUAL PAYEES.**—A promissory note drawn to two persons in their individual names establishes a joint ownership, and not a partnership between the parties to whom the note is given.—*Id.*
4. **ADMISSION BY ONE PARTNER.**—An admission or declaration made by one partner as to the firm’s assets and liabilities, for the purpose of obtaining credit, is competent evidence, at least in the absence of objection on that ground, to show the amount and kind of property the firm had at that time.—*Nat. Bank v. Lesser & Lewinson*, 604.
5. **FRAUDULENT TRANSFER BY FIRM.**—Plaintiff offered in support of its attachment affidavit evidence that the son-in-law of one defendant partner, shortly after a general assignment by the firm, paid off a mortgage on defendant’s property with defendant’s money. Held, not competent evidence to support the allegation of fraudulent disposition and concealment by the firm.—*Id.*
6. **FRAUDULENT TRANSFER—LIMIT OF EVIDENCE.**—Where an attachment affidavit charges a fraudulent disposition of property by a firm, plaintiff is limited in his proof to that class of transfers.—*Id.*
7. **TROVER—CUTTING TIMBER FROM PUBLIC LAND.**—Where the United States sues in trover, for damages for the cutting and converting

to the defendants use timber cut from the public lands, defendants are sued individually as well as under the firm name of Gumm Bros., it is not error for the court to overrule a demurrer to a plea in abatement denying existence of such firm, and alleging existence of firm under another name. In such case a partner may be sued individually without regard to the partnership.—United States v. Gumm Bros., 611.

PERJURY.

CRIMINAL LAW—EVIDENCE—SUFFICIENCY.—The evidence of one witness alone, not corroborated by any other evidence, is insufficient to warrant a conviction of a charge of perjury.—Territory v. Williams, 400.

PHYSICIANS AND SURGEONS. See STATUTORY CONSTRUCTION, 5.

PLEADING.

1. **HOMESTEAD EXEMPTION—SUIT ON OFFICIAL BOND—INTERVENING PETITION—APPEAL.**—Under section 5, Laws 1891, page 123, an appeal does not lie from a suit at law upon an official bond, and the mere filing of an intervening petition in such action did not convert it into an equitable action; it was only a supplementary proceeding in the original suit.—Bank v. Brooks, 9 N. M. p. 113, ante; United States v. Lesnet, 271.
2. **FRIVOLOUS PLEA.**—A plea tendering no issue, is frivolous and may be stricken from the files on motion, and it is not error to ignore it.—Fruit Exchange v. Stamm, 361.
3. **INDICTMENT—STEALING CATTLE.**—The use of the statutory description "one neat cattle" in an indictment, is a sufficient description as commonly applied in the United States and this territory to describe a beast of the bovine genus.—Territory v. Christman, 582.

PLEDGE.

BUILDING AND LOAN STOCK—LIEN FOR EXPENSES.—A pledgee of building and loan association stock is entitled to a lien thereon, as expenses, for payments made by him of assessments thereof, where it is admitted that the levy is legal and that there would be an infliction of fines against the stock for non-payment of the assessments, if the pledger fails or refuses to pay the same.—Wells' Fargo Co.'s Express v. Walker, 456.

POLICE POWER.—See STATUTORY CONSTRUCTION, 5.

PRACTICE.

1. **JUDGMENT—DEFAULT—RECITAL.**—In a judgment by default, it is not necessary to recite that defendant has been called.—Rio Grande Irr. & Col. Co. v. Gildersleeve, 12.
2. **CORPORATIONS—WITHDRAWAL OF APPEARANCE—RATIFICATION.**—Defendant could not complain of the absence of an order granting leave to withdraw its appearance by attorney, where the court in granting a judgment by default ratified the act of withdrawal.—Id.

3. **JUDGMENTS—MOTION TO VACATE—SUFFICIENCY.**—It was not error to overrule a second motion to vacate a judgment by default, where no motion to vacate the judgment was filed until two months after its entry, and no affidavit of merits for a year, and not until after the first motion had been overruled.—*Id.*
4. **PARTNERSHIP—CONTRACT—ASSUMPSIT.**—Where, on an agreement between partners, that the partnership should “stand dissolved from and after” a named date, the retiring partner to retain an interest in the accruing profits of the new firm until a certain date, when an appraisement of the firm’s assets would be made and a final accounting had, an action of assumpsit was brought by the new firm as such on an account against the retired partner for an alleged indebtedness previously accruing,—Held: That the action could not be maintained.—*Wormser & Co. v. Lindauer*, 23.
5. **EQUITY—REMEDY AT LAW.**—If the remedy at law is not plain, adequate and complete, or if the creditor has a trust in his favor, in either case, he is not required to go first into a court of law, but may apply in the first instance to a court of equity for relief.—*Early Times Dist. Co. v. Zeiger*, 31.
6. **TRIAL BY JURY—CONSTITUTIONAL LAW.**—The constitutional right; trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction.—(*Burton v. Barber*, 104 U. S. 104.) *Id.*
7. **TRIAL—WRIT OF ERROR—TIME FOR TAKING.**—Where defendant failed to give notice of intention to file a motion for new trial, the year from final judgment, limited for appeal or writ of error, did not begin to run till the determination of the motion, though judgment was entered on the same day the verdict was returned under the rule of the court requiring it.—*Pearce v. Strickler*, 46.
8. **MOTION FOR NEW TRIAL—POSTPONEMENT OF CONSIDERATION.**—Where the court entertained a motion for new trial, the mere failure of the court to pass upon the motion within the thirty days required by rule of court did not operate to divest jurisdiction over it, but is rather to be construed as deferring its action upon it for good cause, within its power, to further consider the motion.—*Id.*
9. **INSTRUCTIONS.**—Where, in a damage suit, two theories were advanced by plaintiff and defendant, respectively, as to the cause of the explosion, and it was not clear upon which theory the jury found defendant liable, the court erred in not clearly drawing their attention to the law applicable to both theories.—*Cerrillos Coal R’y v. Deserant*, 49.
10. **CERTIORARI—FILING OF DECLARATION—ORDER NUNC PRO TUNC—JURISDICTION.**—On certiorari, where a nunc pro tunc order was made in each of two causes, and the order of one cause was in identical language with that of the other, and both made the same day reciting that the declaration had been left with the clerk, and that the advance fee required by law had in fact been paid, and there was no averment in the petition in conflict with these recitals,—Held: That a paper left with the clerk for filing in a cause, whether marked “filed” or not, is a paper in the cause, and the court had jurisdiction to act in regard to the same.—(*Comp. Laws*, sec. 1867.)—*In re Lewisohn*, 101.

11. **GARNISHMENT—NOTICE — SUFFICIENCY — EXEMPTION.** — In a proceeding by garnishment, of which defendant had notice, but it was not shown how he received such notice, where judgment was rendered against defendant and process of garnishment served on his debtor, defendant's counsel drawing the garnishee's answer, with instructions from defendant to garnishee's counsel to file it within the prescribed time, and several conversations occurred thereafter between defendant and them in relation thereto, defendant failing to make any claim for exemption for more than three months,—Held: That though defendant might not have known when the answer was filed, he had ample notice of the garnishment proceeding, and sufficient opportunity to make his exemption claim before entry of final judgment against the garnishee.—*New Mexico Nat. Bank v. Brooks*, 113.
12. **GARNISHMENT—EXEMPTION—AFFIDAVIT.**—Held: That, an affidavit filed by the defendant in a garnishment proceeding, claiming exemption, is not conclusive, but may be traversed by the plaintiff.—*Id.*
13. **GARNISHMENT—AFFIDAVIT —ISSUES —TRIAL.** —Held: That, in a garnishment proceeding, the issues raised upon the affidavit of defendant and the traverse of its truth by plaintiff, may be tried by the court without a jury, in the absence of any statute prescribing any method of inquiry in such case.—*Id.*
14. **WRIT OF PROHIBITION—DISMISSAL.**—Where judgment was regularly rendered, but not formerly entered, before notice of writ of prohibition, the application for the writ might have been dismissed on that ground.—*In re Roe Chung*, 130.
15. **JUDICIAL SALE—MOTION TO SET ASIDE—FINDINGS OF CHANCELLOR.**—Held: While weight should be given to the findings of the chancellor, yet where, as here, on a motion to set aside a judicial sale, the proofs tended to establish the grounds alleged in the motion, or some of them, and no testimony was produced to the contrary, the chancellor could not disregard such proofs, except so far as they might be discredited in themselves or by other testimony.—*Horse Springs Cattle Co. v. Schofield*, 136.
16. **EJECTMENT—CONSOLIDATION OF SUITS—JUDICIAL DISCRETION.**—The right of the courts of this territory to order the consolidation of causes, in their discretion, is indisputable, and the exercise of such discretion is not subject to reversal, except in cases of palpable abuse.—*Lincoln Lucky, etc. Min. Co. v. Hendry*, 149.
17. **TITLE—OFFER TO PROVE AND FAILURE TO PRODUCE DOCUMENTS.**—An officer to prove a chain of title is properly refused, where the party making the offer fails to produce the documents when asked to do so.—*Id.*
18. **INSTRUCTIONS.**—Where requests to charge the jury, submitted by defendant, were fully covered by the charge of the court, defendant could not complain.—*Id.*
19. **PROMISSORY NOTE—MASTER'S FINDING OF FACT—SUFFICIENCY.**—In a suit on a note, referred by consent to a master, his findings of fact, which were sustained by the evidence, were conclusive.—(*Field v. Romero*, 7 N. M. 630; *De Cordova v. Korte*, *Id.* 678.)—*Wells, Fargo & Co.'s Exp. v. Walker*, 170.

20. **IN EQUITY—FINDINGS OF FACT BY MASTER.**—The findings of a special master in chancery on disputed facts referred to him, have the same force and effect as the special verdict of a jury.—(*Field v. Romero*, 7 N. M. 630; *De Cordova v. Korte*, *Id.* 578.)—*Jarrell v. Barnett*, 254.
21. **MINES AND MINING—ABANDONMENT OF CLAIM—JURY QUESTION.**—In ejectment for the possession of a mining claim, where the question of the abandonment of possession of the claim by plaintiff was in issue, it was a question of fact for the jury.—*Lockhart v. Wills*, 263.
22. **SERVICE OF NOTICE—INTERVENING PETITION—SUFFICIENCY.**—In such action, where the United States marshal was served with a notice of a claim of homestead, but refused to set apart the property, and sold the same under execution, an intervening petition alleging these facts, and that intervener was the wife of defendant, that he had abandoned his family, that the property was the homestead and place of residence of the family, and that she served the marshal with such notice before the sale, the petition was properly sustained.—*United States v. Lesnet*, 271.
23. **WRIT OF ERROR—ABSENCE OF BILL OF EXCEPTIONS—MOTION TO DISMISS—SUFFICIENCY.**—It is no ground for the dismissal of a writ of error, that, the assignments of error being based upon alleged errors occurring during the trial, and none upon the record proper, there is no bill of exceptions upon which they can be based.—In *Rogers v. Richards*, 8 N. M. 658, and in *Insurance Co. v. Walker*, decided at this term, this court, in effect, held the absence of a motion for new trial to be the absence of a bill of exceptions, but in neither case rules that the writ of error should be dismissed.—*Denver & R. G. R'y Co. v. United States*, 309.
24. **BILL OF EXCEPTIONS—SUFFICIENCY.**—Where a bill of exceptions recited that it contained certain things, including "the notes of the testimony of witness, as taken down by counsel" at the trial, though it did not contain all of the evidence introduced on the trial; and the certificate of the trial judge recited that the bill was "signed, settled and sealed as a bill of exceptions, and made part of the record in the cause,—Held: That it was sufficient.—*Id.*
25. **TAKING OF TESTIMONY BEFORE MASTER—ADJOURNMENTS WITHOUT NOTICE.**—Where it appeared from the report of a master that he began the taking of the testimony, and adjournments were had from time to time until a certain date, after which there were no adjournments, yet the taking of testimony was resumed, without notice to the parties in interest that it would be resumed, or a waiver of such notice by the appearance of the parties, it was error to receive such testimony.—*Rice v. Schofield*, 314.
26. **BOND—JUDGMENT WITHOUT NOTICE.**—Where a paper purporting to be a bond" filed in a cause pending the hearing, conditioned to answer any judgment that might be recovered against the principal, did not appear to have been acknowledged before the court or judge, and the persons purporting to be sureties on the bond were not before the court, were not parties to the cause, nor giving any notice of the proceedings against them, a judgment against such persons was unauthorized and erroneous.—*Id.*
27. **JUDGMENT—REVIVAL—SCIRE FACIAS—LIMITATION.**—A judgment barred by statutes of limitations of seven years, section 1861, Compiled Laws, 1897, can not be revived by scire facias.—*Browne & Manzanares Co. v. Chavez*, 316.

28. **STRIKING OUT PARTIES.**—Under section 1911, Comp. Laws, 1884, an order allowing plaintiff to amend by striking out parties plaintiff before trial and without objection is not erroneous, no injury appearing to have resulted to any of the parties.—*Neher v. Armijo*, 325.
29. **WRIT OF ERROR—AMENDMENT.**—Under the code, it is within the power of this court to permit an amendment of the writ of error by striking out the parties defendant in error.—*Id.*
30. **PEREMPTORY INSTRUCTION.**—When the facts produced by plaintiff show a forfeiture of his location of a mining claim, it is the duty of the court to instruct the jury to find for the defendants.—*Lockhart v. Wills*, 344.
31. **REASON FOR RULING.**—The assignment of a wrong reason for an act by the trial court is not reversible error if the act done was in law right.—*Id.*
32. **APPEALS—AFFIRMANCE.**—When the plaintiff's case is inherent and fatally defective and is incurable, the defendant is entitled to have the judgment affirmed, notwithstanding error of the trial court.—*Id.*
33. **NO EXCEPTIONS.**—This court will not review alleged errors, where exceptions were not taken out at the time and preserved.—*Fruit Exchange v. Stamm*, 361.
34. **FRIVOLOUS PLEA.**—A plea tendering no issue, is frivolous and may be stricken from the files on motion, and it is not error to ignore it.—*Id.*
35. **WAIVER OF PLEA.**—Where the record, on appeal, does not show that a plea in abatement was not urged for hearing before the trial, it will be presumed to have been abandoned.—*Id.*
36. **SET-OFF—ABANDONMENT OF PLEA.**—A defendant who has pleaded set-off, in moving the court to instruct the jury for himself at the conclusion of the plaintiff's case, abandons his plea and is not put to its proof.—*Garcia v. Candelaria*, 374.
37. **ACTION ON CONTRACT—PAROL EVIDENCE.**—Courts will not admit evidence on the trial of an action based on a written contract, the effect of which would be to vary its terms from their plain intent and meaning.—*Price & Walker v. Wood and Parker*, 397.
38. **COURT SHOULD WITHDRAW EVIDENCE, WHEN.**—Where such evidence is inadvertently permitted to go to the jury, it is the duty of the court to withdraw such evidence.—*Id.*
39. **CRIMINAL LAW—APPEAL—ASSIGNMENTS.**—Alleged errors occurring at the trial in criminal cases must be called to the attention of this court by motion for new trial, exception to the overruling of the motion must be saved and the motion and exception made a part of the record by bill of exceptions before this court will consider them.—*Territory v. Archibeque*, 403.
40. **CIVIL CODE—NOT APPLICABLE TO CRIMINAL CASE.**—The code of civil procedure does not control the requirements as to appeals in criminal cases.—*Id.*

41. **ERROR—MOTION FOR NEW TRIAL—REVIEW.**—Where a motion for a new trial was not made within five days, as provided in section 2685, sub-section 133, Compiled Laws of 1897, errors alleged to have been committed by the court below will not be reviewed.—*Schofield v. Slaughter*, 422.
42. **JURY TRIALS.**—Where a jury is impaneled and evidence taken before it on the trial of a cause, it is a jury trial within the meaning of section 2685, sub-section 133, Compiled Laws of 1897, though the jury rendered its verdict by direction of the court.—*Id.*
43. **REFERENCE—FINDING—WAIVER OF OBJECTION.**—Where, on motion of complainant, an order of reference to a master is made to take proofs and report the same with his opinion, but instead the master reports his findings of facts and conclusions of law, it will be presumed, nothing to the contrary appearing in the record, that the court below acted upon the report as made and complainant's failure to specifically object in the court below is a waiver of his right to object here.—*Wells, Fargo & Company's Express v. Walker*, 456.
44. **FINDING OF REFEREE—SPECIAL VERDICT.**—A finding of fact by a master is equivalent to the special verdict of a jury, and can not be disturbed unless the evidence is manifestly insufficient to support it. Where there is not any evidence to support the findings of the master, the court below properly sets them aside.—*Id.*
45. **INSTRUCTIONS.**—It is not error to refuse a second instruction upon a point fairly submitted to the jury by instructions given.—*Pearce v. Strickler*, 467.
46. **SUBSTANTIAL JUSTICE.**—Where substantial justice has been accomplished between the parties in the court below, the judgment will not be reversed by this court.—*Id.*
47. **DIRECTING VERDICT.**—Where there is no substantial conflict in the evidence adduced by the parties plaintiff and defendant, the court may direct verdict.—*Solomon v. Yrisarri*, 480.
48. **FAILURE OF PROOF.**—Where one party wholly fails to make proof of the essential elements necessary to sustain his side of the contention in suit, and the adverse party has made a prima facie case, the court should direct a verdict for the adverse party.—*Id.*
49. **SPECIAL FINDINGS.**—When a party fails to make his proof in a trial, requests for special findings of the jury are properly refused by the court.—*Id.*
50. **TIME TO PLEAD—JUDGMENT BY DEFAULT.**—Defendants at a suit at law or in equity have the whole of the last rule day within which to plead, and a default judgment taken prior to the expiration of the whole of that day is void.—*Lohman v. Cox*, 503.
51. **SPECIAL VERDICT.**—The code of civil procedure, passed in 1897, does not repeal the statutory authority providing that juries shall, when required, make special findings.—*Schofield v. Territory ex rel.*, 526.
52. **AWARDING NEW TRIAL.**—A trial court has power to grant a new trial in the alternative, provided that the plaintiff does not remit a portion of the damages recovered by him.—*Id.*

53. **PREPARING FOR APPEAL—MOTIONS—EXCEPTIONS.**—Alleged errors relating to proceedings during the trial of a criminal case and to the overruling of a motion for a continuance can not be reviewed, unless called to the attention of the trial court by motion for a new trial, exceptions saved to the overruling of such motion and the motion made matter of record by bill of exceptions.—*Territory v. Christman*, 582.
54. **CONFLICT OF EVIDENCE—VERDICT—CONCLUSIVENESS.**—In a criminal case, where there is neither an absence of competent evidence against the accused nor a decided preponderance in his favor, and there is a direct conflict in the testimony, the jury's verdict is a conclusive adjudication of the facts of the case.—*Territory v. Pino*, 598.
55. **INSTRUCTION—REFUSAL—WHEN ERROR.**—The refusal of the court to give an instruction properly requested by defendant which is a correct statement of the law applicable to the facts in the case and consistent with a reasonable theory other than that of defendant's guilt, and not covered by any other instruction which was given by the court is reversible error.—*Id.*
56. **CONFLICT OF EVIDENCE—MATTER FOR JURY.**—Where competent evidence sufficient to sustain a verdict has been given to the jury tending to prove the illegal cutting and appropriation of timber of the United States, and by the defendant, competent evidence tending to justify such acts, it is for the jury to determine the weight of such evidence, and it is error for the court to take the case from the consideration of the jury.—*United States v. Gumm Bros.*, 611.

PRACTICE OF MEDICINE. See **STATUTORY CONSTRUCTION**, 5.

PRINCIPAL AND AGENT.

FOREIGN CORPORATION—APPEARANCE BY AGENT.—Where an agent of a foreign corporation on whom process can be served, enters appearance for such defendant corporation, after the period of over three years has elapsed without objection being made to such appearance, it is too late for the corporation to withdraw such appearance, unless it is shown that it had no knowledge of such appearance.—*Assurance Co. v. Bartlett & Tyler*, 554.
See, also, **CORPORATIONS**, 1.

PROCESS.

SERVICE—SUFFICIENCY—APPELLATE PRACTICE.—In such proceeding, failure to serve the garnishee with a summons in the form prescribed by the clerks of the district courts, is not ground for reversal; it is sufficient if the service be in substantial compliance with the requirements of the statute. (*Fitzgerald v. Fitzgerald*, 137 U. S. 98.)—*Western Homestead & Irr. Co. v. First Nat. Bank*, 1.

PROHIBITION.

WRIT OF—DISMISSAL.—Where judgment was regularly rendered, but not formerly entered, before notice of writ of prohibition, the application for the writ might have been dismissed on that ground.—*In re Roe Chung*, 130.

PROMISSORY NOTES. See **NOTES**.

PUBLICATION. See **SUMMONS**.

PUBLIC LANDS.

1. **CUTTING TIMBER THEREFROM—RAILROADS—STATUTORY CONSTRUCTION.**—The term "adjacent," within the meaning of the act of congress allowing the Denver and Rio Grande Railroad to take timber for construction from public lands adjacent to the right of way, does not apply to lands lying beyond the tier of townships adjoining those through which the right of way of the road extends.—U. S. v. Bachelder, 15.
2. **CUTTING TIMBER—PRESUMPTION—BURDEN OF PROOF.**—In actions in trover for alleged unlawful cutting of timber from the public domain, when the defendant proves that it had a lawful right, under a grant given by act of congress, to enter on public lands adjacent to its railroad line, and cut timber therefrom, for certain specified purposes, the presumption is that such cutting was done in accordance with the terms of the act, and not contrary thereto. The burden of proof is on the plaintiff to show that the grantee exceeded the terms of its grant, and not on the defendant to show that it had not.—Denver & Rio Grande Railroad Co. v. United States, 382.
3. **CUTTING TIMBER—TROVER—PARTNERS—INDIVIDUAL LIABILITY.**—Where the United States sues in trover, for damages for the cutting and converting to the defendant's use timber cut from the public lands, defendants are sued individually as well as under the firm name of Gumm Bros., it is not error for the court to overrule a demurrer to a plea in abatement denying existence of such firm, and alleging existence of firm under another name. In such case a partner may be sued individually without regard to the partnership.—United States v. Gumm Bros., 611.
4. **LICENSE—BURDEN OF PROOF.**—Where defendants plead a license to cut and convert such timber the burden of proof is upon defendants upon that issue.—Id.
5. **LICENSE—NECESSARY PROOF.**—In order to establish license under the act of congress approved June 3, 1878, it is necessary to prove compliance with section 1, of the act, and also the rules and regulations prescribed by the secretary of the interior as required by said section.—Id.
6. **COMPETENT EVIDENCE—PROPER INSTRUCTIONS.**—Where the defendant introduces competent evidence tending to prove license, it is error to refuse instructions requested by the plaintiff embodying the rules prescribed by the secretary of the interior.—Id.
7. **SECRETARY OF INTERIOR—JUDICIAL NOTICE.**—The court, in such case will take judicial notice of such rules and regulations.—Id.
8. **CONFLICT OF EVIDENCE—MATTER FOR JURY.**—Where competent evidence sufficient to sustain a verdict has been given to the jury tending to prove the illegal cutting and appropriation of timber of the United States, and by the defendant, competent evidence tending to justify such acts, it is for the jury to determine the weight of such evidence, and it is error for the court to take the case from the consideration of the jury.—Id.

PUBLIC SCHOOLS.

1. **DISTRICT CORPORATION.**—The public schools of the city of Albuquerque organized under the laws of 1891, are not city schools.—Water Supply Co. v. Albuquerque. 441.

2. **NO PART OF MUNICIPALITY.**—The board of education of the city of Albuquerque, is a district corporation for school purposes and is not a mere function or part of the municipal government of the city.—*Id.*
3. **WATER SUPPLY—SCHOOL—"CITY PURPOSES."**—Under a contract by which the Water Supply Company of Albuquerque agreed to furnish the city of Albuquerque with twelve million gallons of water every six months for "city purposes" to be used as the city council may direct,—Held: That it is not a city purpose to furnish water to the board of education for the use of the public schools in the city of Albuquerque, and upon the refusal of said board to pay for the water necessary for said schools, injunction will not lie to prevent the water company from shutting off the water from the schools.—*Id.*
4. **BOARD OF EDUCATION—LIMIT OF WARRANTS.**—Prior to March 12, 1897, there was no statutory inhibition upon the board of education of a town in New Mexico from issuing warrants evidencing indebtedness up to the four per centum Federal limitation, although there was not at the time of their issuance funds in the hands of the treasurer with which to pay the same.—*Board of Education of Eddy v. Bitting*, 588.
5. **CORPORATE LIMITS—INDEPENDENT OF CITY.**—Said board of education may independently of any political or other municipal corporation or other sub-division of the territory, and regardless of the fact that the corporation known as the town of Eddy is situate wholly within the same territorial limits, lawfully incur an indebtedness for school purposes not to exceed four per centum of the value of the taxable property within its limits, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness.—*Id.*
6. **FEDERAL LIMITATION ACT.**—The board of education of the town of Eddy is a district municipal corporation, for school purposes, and is one of the corporations enumerated in the act of congress of July 30, 1886, known as the Federal limitation act.—*Id.*

PURCHASERS. See **COMMUNITY PROPERTY**, 3, 4.

RAILROADS. See **STATUTORY CONSTRUCTION**, 1.

RATIFICATION. See **PRACTICE**, 2.

RECORD PROPER. See **APPELLATE PRACTICE**, 5.

PREFERENCE.

1. **GENERAL FINDING—WAIVER OF OBJECTIONS.**—Where, on motion of of complainant, an order of reference to a master is made to take proofs and report the same with his opinion, but instead the master reports his findings of fact and conclusions of law, it will be presumed, nothing to the contrary appearing in the record, that the court below acted upon the report as made and complainant's failure to specifically object in the court below is a waiver of his right to object here.—*Wells, Fargo & Company's Express v. Walker*, 456.
2. **FINDING OF MASTER EQUIVALENT TO SPECIAL VERDICT.**—A finding of fact by a master is equivalent to the special verdict of a jury, and can not be disturbed unless the evidence is manifestly insufficient to support it.—*Id.*

3. **NO SUBSTANTIAL EVIDENCE.**—Where there is not any evidence to support the findings of the master, the court below properly sets them aside.—*Id.*
4. **FINDINGS OF MASTER—SCOPE—PRESUMPTION.**—An order of reference to a master directing him to take the proofs and report the same to the court, with his conclusions thereon, and the master acting thereunder makes findings of facts and conclusions of law, and no objection is made either to the order or the action of the master thereunder in assuming to make such findings, it will be presumed that the master acted within the scope of his authority and with the consent of the parties.—*Nat. Bank of Albuquerque v. McClellan*, 636.
5. **FINDINGS OF MASTER—CONCLUSIVENESS.**—Where the cause is referred to a master with the consent of the parties to find the facts and draw conclusions therefrom, and the master passes upon the weight of conflicting evidence and the credibility of witnesses, and where there is evidence to support his findings and they can not be said to be manifestly wrong, his findings of fact are to be treated as unassailable, and it is error in the court below to overrule them.—*Id.*

REPLEVIN.

NO PLFA FILED—FAILURE OF PLAINTIFF TO PROSECUTE.—In replevin, where the defendant files no plea, there is no issue, and a trial can not be had, though plaintiff fails to appear. The statute directing how judgment shall be entered in such cases is imperative and must be followed. (*Comp. Laws*, sec. 6, 7, p. 244.)—*Elsberg & Amberg v. Maurin*, 645.

REPORT OF MASTER. See *APPELLATE PRACTICE*, 1, 4; *PRACTICE*, 19; 20; *MASTER*.

RES ADJUDICATA. See *JUDGMENTS*; *HUSBAND AND WIFE*, 3.

RIO GRANDE RIVER.

NAVIGABLE STREAMS—OBSTRUCTION—ACTS OF CONGRESS, SEPTEMBER 19, 1890, AND JULY 13, 1892, CONSTRUED.—Held: That, the waters of the Rio Grande are not navigable in New Mexico, and can not be said to be navigable waters in respect to which the United States has jurisdiction within the meaning of the acts of congress of September 19, 1890, section 10, and July 13, 1892, section 3, prohibiting the erection of any dam or other structure in the navigable waters of the United States, without permission of the secretary of war; and the construction of a dam across that stream within New Mexico for irrigation purposes is not in violation of these acts, nor of any law of the United States, nor of any treaty.—*United States v. Dam and Irrigation Co.*, 292.

RIVERS.

NAVIGABLE STREAMS—OBSTRUCTION—ACTS OF CONGRESS, SEPTEMBER 19, 1890, AND JULY 13, 1892, CONSTRUED.—Held: That the waters of the Rio Grande are not navigable in New Mexico, and can not be said to be navigable waters in respect to which the United States has jurisdiction within the meaning of the acts of congress of September 19, 1890, section 10, and July 13, 1892, section 3, prohibiting the erection of any dam or other structure in the navigable waters of the United States, without permission of the secretary of war; and the construction of a dam across that stream within New

Mexico for irrigation purposes is not in violation of these acts, nor of any law of the United States, nor of any treaty.—United States v. Dam and Irrigation Co., 292.

SALES.

1. **JUDICIAL SALE—MOTION TO SET ASIDE—FINDINGS OF CHANCELLOR.**—Held: While weight should be given to the findings of the chancellor, yet where, as here, on a motion to set aside a judicial sale, the proofs tended to establish the grounds alleged in the motion, or some of them, and no testimony was produced to the contrary, the chancellor could not disregard such proofs, except so far as they might be discredited in themselves or by other testimony.—Horse Springs Cattle Co. v. Schofield, 136.
2. **MATERIAL ERRORS—UNCONSCIONABLE ADVANTAGE.**—Held: That where, as here, a judicial sale of property is based upon material errors, which, if allowed to stand, would result in permitting the purchaser to enjoy an "unconscionable advantage," by the sacrifice of the property, through such errors, the sale will be set aside. (Blackburn v. Railroad Co., 3 Fed. Rep. 689.)—Id. See, also, **COMMUNITY PROPERTY**, 3, 4.

SCIRE FACIAS. See **JUDGMENTS**, 12.

SCHOOLS. See **PUBLIC SCHOOLS**.

SCHOOL WARRANTS. See **PUBLIC SCHOOLS**.

SERVICES. See **LIENS**.

SET-OFF.

1. **ABANDONMENT OF PLEA.**—A defendant who has pleaded set-off, in moving the court to instruct the jury for himself at the conclusion of the plaintiff's case, abandons his plea and is not put to its proof.—Garcia v. Candelaria, 374.
2. **JUDGMENTS IN CROSS-ACTIONS MAY BE.**—Judgments in cross-action may be set-off, the one against the other, when the parties in interest are the same, on motion addressed to the court in which one or both of the actions is pending.—Scholle v. Pino, 393.
3. **AFTER ASSIGNMENT OF JUDGMENTS.**—If, after both such judgments or claims are matured, one party assigns his judgment or claim, such set-off will be allowed notwithstanding such assignment.—Id.

SETTING ASIDE SALE. See **SALES**.

SPECIAL AND LOCAL LEGISLATION.

1. **STATUTORY CONSTRUCTION.**—Whenever an act of the legislature can be so construed and applied as to avoid a conflict with the laws of congress and give it the force of law, such construction should be adopted by the court.—Codlin v. County Commissioners, 565.
2. **SPECIAL LEGISLATION.**—It is not necessary that the law should operate upon all counties and cities of the territory to be constitutional. If the law is general and uniform throughout the territory, operating upon all of a certain necessary or reasonable class, or upon all who are brought within the relations and circumstances provided in the act and such law has provision for future as well as present

operation, and it is not obnoxious to the limitations against special and local legislation of the act of congress, known as the Springer Act.—Id.

3. **VALIDITY OF CHAPTERS 6, 33, LAWS 1897.**—Chapters 6 and 33, Session Laws of 1897, are not local or special legislation within the meaning of the act of congress approved July 30, 1886, chapter 818, 24 statute 170, and mandamus lies to compel a board of county commissioners to perform a duty required by chapters 6 and 33.—Id.

SPECIAL TAX. See **TAXATION**, 1.

SPECIFIC PERFORMANCE.

CONTRACT—JURISDICTION.—While a court of equity, in an action against a town for the specific performance of a contract for the payment of water rents, may declare the validity of the contract, it has no jurisdiction to compel the town to make a levy, the remedy in such case being by mandamus.—Raton Waterworks Co. v. Raton, 70.

SPECULATIVE RISK. See **INSURANCE**.

STATUTES.

1. **NOTICE OF CONTENTS—ESTOPPEL.**—The statutes are a public notice of their contents, and a complainant contracting presumably with a knowledge that defendant was limited, by the statute creating it, to a two-mill levy for the discharge of its obligations, will not be heard to complain that the trustees of defendant refused to transcend the power.—Raton Waterworks Co. v. Raton, 70.
2. **EVIDENCE—SPECIAL ACTS OF CONGRESS.**—Special acts of congress are required to be proven on a trial of a cause the same as any other fact.—Denver & Rio Grande Railroad Co. v. United States, 389.
3. **STATUTES REPEALED—INFERENCE WITH ACEQUIUS.**—Section 39, Compiled Laws of 1884, is repealed by chapter 1 of the laws of 1895, and a judgment entered under the former subsequent to the passage of the latter act is illegal and void.—Levy v. Ortega, 391.

STATUTORY CONSTRUCTION.

1. **PUBLIC LANDS—CUTTING TIMBER FOR RAILROAD.**—The term “adjacent,” within the meaning of the act of congress allowing the Denver and Rio Grande Railroad to take timber for construction from public lands adjacent to the right of way, does not apply to lands lying beyond the tier of townships adjoining those through which the right of way of the road extends.—U. S. v. Bachelder, 15.
2. **MUNICIPAL CORPORATIONS—CONTRACT—SPECIAL TAX LEVY.**—Held: That paragraph 71, section 1622, Compiled Laws 1884, providing that the special tax therein authorized for the payment of water rents, shall not exceed the sum of two mills on the dollar for any year, is a limitation on the sum to be paid therefor by special tax, and an inhibition of the trustees of the town of Raton from paying any more than the sum derived from the two-mill levy on the dollar upon the property subject to taxation within its corporate limits.—Raton Waterworks Co. v. Raton, 70.

3. MUNICIPAL CORPORATIONS—TAXATIONS.—Nor is the effect of paragraph 71 supra, changed by paragraphs 2, 3, 6, section 1622, Compiled Laws 1884, authorizing and directing the town of Raton and all similar municipal corporations to assess and levy taxes for general and special purposes, and when collected to be applied “only” to the purposes in the ordinance “No. 10” specified.—Id.
4. EXEMPTION LAWS 1887 CONSTRUED.—Held: That the law of 1887, exempting the personal earnings of the debtor and his minor children, for three months, from attachment or other process, was not intended to encourage extravagance and the evasion of just debts, but for the necessary support of the debtor’s family and himself; and that \$3,600 a year is more than sufficient to support comfortably any average family.—New Mexico Nat. Bank v. Brooks, 113.
5. PHYSICIANS AND SURGEONS—IMPRISONMENT FOR DEBT—ACT FEBRUARY 27, 1895 CONSTRUED.—There is no inconsistency between section 8 of the act of February 27, 1895, prescribing a penalty for practicing medicine or surgery in this territory without a certificate from the board of health, and section 9 of the same act, providing for imprisonment for failure to pay the penalty; that act is simply a valid exercise of the police power of the territory.—In re Roe Chung, 130.
6. IMPRISONMENT FOR DEBT—JUSTICES OF THE PEACE—JURISDICTION.—Section 2321 of the act of 1876, limiting imprisonment to thirty days, was repealed by the act of 1889, providing that all fines and costs of imprisonment may be suffered at the rate of one dollar per day until the days amount to the fine and costs, by which jurisdiction was conferred on justices of the peace to sentence for a longer period.—Id.
7. MINES AND MINING—LIEN—SUPERINTENDENT’S CLAIM FOR LIEN.—Held: That the superintendent and general manager of a mine, who has merely the management of the mine, and does not actually perform any bodily labor upon or in the mine, is not entitled to the benefit of section 1520, Compiled Laws, giving to every person performing labor upon or in a mine a lien upon the mine.—Boyle v. Mountain Key Mining Co., 237.
8. SUPERINTENDENT OF MINE—NO LIEN FOR SERVICES, WHEN.—Held: That the superintendent’s claim, being for a fixed sum for all his services, part of which were not within the scope of the statute, supra, is void in toto.—Id.
9. EXEMPTION CLAIM—SUFFICIENCY AS AGAINST UNITED STATES.—Under an act of congress of July 14, 1870, one entitled to an exemption of homestead under the laws of New Mexico, may hold the same against the United States.—United States v. Lesnet, 271.
10. CONFLICT WITH FEDERAL STATUTE.—Whenever an act of the Legislature can be so construed and applied as to avoid a conflict with the laws of congress and give it the force of law, such construction should be adopted by the court.—Codlin v. County Commissioners, 565.

STENOGRAPHER'S FEES.

TESTIMONY BEFORE MASTER IN CHANCERY.—The charges of a stenographer used by a master in chancery, in the absence of stipulation or agreement, can not be taxed as costs; the court having ordered the master to take the proofs and it being presumed that the master’s allowance was made to cover all such services.—Givens v. Veeder, 405.

STREETS AND STREET IMPROVEMENTS. See **MUNICIPAL CORPORATIONS.**

SUMMONS.

SERVICE BY PUBLICATION.—The court has jurisdiction to render a judgment in rem, where a levy of defendant's property has been made under a valid writ of attachment, and service by publication had as required by law, notwithstanding the return of the officer was not made until after judgment was taken.—*Fruit Exchange v. Stamm*, 361.

See ,also, **PROCESS.**

SURETY. See **BONDS; NOTES, 2.**

TAXATION.

1. **MUNICIPAL CORPORATIONS—CONTRACT—SPECIAL TAX LEVY—STATUTORY CONSTRUCTION.**—Held: That paragraph 71, section 1622, Compiled Laws 1884, providing that the special tax therein authorized for the payment of water rents, shall not exceed the sum of two mills on the dollar for any year, is a limitation on the sum to be paid therefor by special tax, and an inhibition on the trustees of the town of Raton from paying any more than the sum derived from the two-mill levy on the dollar upon the property subject to taxation within its corporate limits.—*Raton Waterworks Co. v. Raton*, 70.
2. **STATUTORY CONSTRUCTION.**—Nor is the effect of paragraph 71, supra, changed by paragraphs 2, 3, 6, section 1622, Compiled Laws 1884, authorizing and directing the town of Raton and all similar municipal corporations to assess and levy taxes for general and special purposes, and when collected to be applied "only" to the purposes in the ordinance "No. 10" specified.—*Id.*
3. **CONTRACT—CONSTRUCTION.**—The contract of a town to pay more than it has the power to collect by taxation is not void, but obligates the town to exhaust its power, if necessary, to collect a tax sufficient within the statutory limitation of levy of two mills upon the entire taxable property within its jurisdiction.—*Id.*

TROVER.

CUTTING TIMBER FROM PUBLIC LANDS—ABATEMENT.—Where the United States sues in trover, for damages for the cutting and converting to the defendants' use timber cut from the public lands, defendants are sued individually as well as under the firm name of Gumm Bros.. it is not error for the court to overrule a demurrer to a plea in abatement denying existence of such firm, and alleging existence of firm under another name. In such case a partner may be sued individually without regard to the partnership.—*United States v. Gumm Bros.*, 611.

See, also, **PUBLIC LANDS, 3.**

VERDICT.

1. **AMOUNT OF AWARD.**—The supreme court sits only to correct errors committed on the trial of a cause below and not to pass upon the specific amount of the award of the jury in determining the case.—*Schofield v. Territory ex rel.*, 526.

2. **REMITTITUR.**—A trial court has power to grant a new trial in the alternative, provided that the plaintiff does not remit a portion of the damages recovered by him.—Id.
3. **SPECIAL FINDING.**—The code of civil procedure, passed in 1897, does not repeal the statutory authority, providing that juries shall, when required, make special findings.—Id.
4. **CONFLICT OF EVIDENCE—MATTER FOR JURY.**—In a criminal case, where there is neither an absence of competent evidence against the accused nor a decided preponderance in his favor, and there is a direct conflict in the testimony, the jury's verdict is a conclusive adjudication of the facts of the case.—Territory v. Pino, 598.
5. **CONCLUSIVENESS.**—Where competent evidence sufficient to sustain a verdict has been given to the jury to prove the illegal cutting and appropriation of the timber of the United States, and by the defendant, competent evidence tending to justify such acts, it is for the jury to determine the weight of such evidence, and it is error for the court to take the case from the consideration of the jury.—United States v. Gumm Bros., 611.

TENANT IN COMMON.

1. **EJECTMENT—PARTIES TO ACTION.**—Tenants in common may join in ejectment and recover their interest demanded so held by them in common.—Neher v. Armijo, 325.
2. **CONVEYANCES—OUSTER.**—The act on the part of all the tenants in common in executing a deed with full warranty of covenants purporting to convey the entire estate is ouster of the other cotenants.—Id.

TIMBER. See PUBLIC LANDS.

TITLE. See COMMUNITY PROPERTY.

TRESPASS. See DAMAGES, 4, 5.

TRIAL BY JURY. See JURY TRIAL.

WAGER POLICY. See INSURANCE.

WAIVER. See NEGLIGENCE, 1.

WARRANTS. See CITY WARRANTS; COUNTY WARRANTS.

WATER RENTS. See TAXATION, 1; CONTRACTS, 6.

WATER SUPPLY. See CONTRACTS, 5.

WIFE. See HUSBAND AND WIFE.

WITNESSES.

IMPEACHMENT—REPUTATION.—The character of the prosecutrix for chastity may be impeached only by general evidence of her reputation, and not by evidence of particular instances of unchastity.—Territory v. Pino, 598.

WRIT OF ERROR. See APPEALS.

WRIT OF PROHIBITION. See PROHIBITION.

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